BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 224 of the Act;	)	WC Docket No. 07-245
	)	
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	

To: The Commission

COMMENTS OF THE EDISON ELECTRIC INSTITUTE AND THE UTILITIES TELECOM COUNCIL

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EXECUTIVE SUMMARY

The Federal Communications Commission's authority under Section 224 to regulate electric utilities is strictly circumscribed. Congress did not provide the FCC with sweeping authority to regulate the facilities of electric utilities or to impose overly broad requirements on the entire electric industry. Section 224 makes clear that the FCC's authority to regulate the rates, terms, and conditions of access is invoked only at such time as an attaching entity uses the procedures adopted under Section 224 to file a complaint with the FCC alleging a denial of access or an allegedly unjust or unreasonable rate, term or condition. Outside the very limited context of addressing a specific dispute involving a pole owner and a requesting entity, the FCC does not have general jurisdiction over electric utilities.

Despite this narrow and constrained grant of jurisdiction by Congress, the FCC proposes to expand its regulatory authority over electric utilities. For example, the FCC suggests it has authority to require an electric utility to comply with specific timelines for completion of make-ready and to establish, update, and maintain a database of all of its assets that could *potentially* be subject to an access request. The FCC's proposals would also restrict the ability of an electric utility and an attaching entity to voluntarily enter into an agreement governing the use of outside contractors, payment of make-ready charges, and the application and permitting process for poles subject to joint use and joint ownership arrangements. The FCC lacks jurisdiction to implement these proposals because the FCC cannot regulate the conduct of electric utilities that is either prior to or otherwise outside the scope of a complaint case.

Furthermore, the FCC's proposal to redefine the telecommunications rate formula in Section 224(e) is a transparent, and ultimately economically inefficient, attempt to compel

electric utilities to subsidize communication service. While the goal of promoting broadband service is laudable, the method proposed by the FCC to drive the telecom rate under Section 224(e) to levels that are at or below the rates calculated under Section 224(d) would violate the plain language of the statute and Congressional intent, as well as result in an unconstitutional taking.

Even assuming the FCC has statutory authority to implement these proposals, the agency should not adopt them because they would interfere with the duties and obligations of electric utilities to provide safe, reliable, and efficient energy services to the public. Electric utilities are heavily regulated and maintain critical infrastructure that is used to support national priorities relating to energy independence, energy efficiency, smart grid technology, and cyber security. Thus, the FCC must ensure that electric utilities and attaching entities have maximum flexibility to structure their pole attachment agreements to ensure the safety and reliability of utility infrastructure. In any event, the FCC must revise its proposals so that they do not undermine the core mission of the electric utility industry, threaten public safety, or impose an undue burden on electric utility ratepayers.

First, the FCC should not impose specific make-ready deadlines that fail to take account variables, such as the size of the build-out, the size of the utility, the number of requests received by a utility within a given timeframe, state and local requirements, an individual utility's internal operating standards, or regional differences. At most, the FCC should recommend targeted dates that could be used as rebuttable presumptions regarding a reasonable timeline for completing make-ready. If the parties are unable to agree upon an alternative timeline, the utility must have an opportunity, in any given case that comes before the FCC, to explain why the presumptive timeline is unreasonable under the circumstances and provide evidence that a longer timeline is

warranted. The FCC must also allow a utility to stop the make-ready clock due to circumstances beyond the control of the utility. EEI and UTC provide suggestions below on circumstances that would warrant extending the timeline, such as deficient applications, lack of cooperation by existing attachers, outages, and other events that impede the make-ready process.

EEI and UTC oppose any requirement that utilities must publicly disclose critical energy infrastructure information or turn over such information for inclusion in a national database maintained by the FCC or a third-party entity because it would significantly endanger the safety and operation of energy production and delivery systems across the country. In addition, implementing and updating a database would force utilities to devote significant resources and incur expenses that would have to be passed onto broadband consumers, without providing any corresponding benefit to the negotiation process or the resolution of pole attachment disputes.

The FCC lacks statutory authority to adopt several proposals that the FCC asserts will expedite the pole attachment permitting process, such as use of outside contractors, designating a "managing utility" for jointly-owned poles, and publishing schedules of common make-ready charges. These proposals are beyond the FCC's limited statutory authority to regulate the rates, terms, and conditions of pole attachments in the context of a specific complaint. In the event the FCC proceeds with such rules, the FCC must ensure that they allow appropriate deference to state and local requirements and decisions by individual utilities regarding safety and reliability.

EEI and UTC oppose the FCC's proposal to allow for compensatory damages in complaint proceedings this is beyond the FCC's authority under Section 224. The statute is clear that the FCC's enforcement authority is limited and does not include the right to impose compensatory damages against electric utilities. In order to deter unsafe and unlawful practices

by attachers and to ensure the safety and reliability of critical electric infrastructure, the FCC must uphold the rights of utilities to impose significant monetary liquidated damages similar to those adopted in Oregon for unauthorized and unsafe attachments.

Instead of revising the so-called "sign and sue rule" as proposed by the FCC, EEI and UTC urge the FCC to eliminate the sign-and-sue rule so that any disputes or controversies regarding the rates, terms and conditions for pole attachments can be addressed promptly and efficiently at the outset. While the FCC has attempted to improve upon the existing rule to provide some incentive to attaching entities to engage in good faith negotiations, the revised rule provides no solution at all.

Finally, under Section 224, the FCC may not adopt any regulations that would provide ILECs with the right to file complaints with the FCC over the rates, terms, and conditions of joint use agreements or joint ownership agreements.

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Pursuant to sections 1.415 and 1.419 of the Federal Communications Commission's ("FCC" or "Commission") Rules, the Edison Electric Institute ("EEI") and the Utilities Telecom Council ("UTC"), on behalf of their member companies, hereby submit these Comments to address the questions and issues raised in the Commission's *Further Notice of Proposed Rulemaking* ("*FNPRM*") in the above-captioned proceedings regarding amendment of the Commission's rules and policies governing pole attachments.[1]

I. INTRODUCTION

EEI is the association of the United States investor-owned electric utilities and industry associates worldwide. Its U.S. members serve almost 95 percent of all customers served by the

[1]/ *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Order and Further Notice of Proposed Rulemaking, FCC 10-84 (rel. May 21, 2010) ("*Pole Attachment FNPRM*"). The Pole *Attachment FNRPM* was published in the Federal Register on July 15, 2010. 75 Fed. Reg. 41338.

shareholder-owned segment of the U.S. industry, about 70 percent of all electricity customers, and generate about 70 percent of the electricity delivered in the U.S.

EEI frequently represents its U.S. members before Federal agencies, courts, and Congress in matters of common concern, and has filed comments before the Commission in various proceedings affecting the pole attachment interests of its members, who are subject to FCC and state pole attachment jurisdiction. Accordingly, EEI and its members have a strong interest in the FCC's proposals to clarify or revise its rules and policies related to pole attachments.

UTC is the international trade association for the telecommunications and information technology interests of electric, gas and water utilities and other critical infrastructure industries, including pipeline companies. Its members include investor-owned, municipal and cooperatively organized utilities. Thus, UTC advocates for the interests of all utilities in pole attachments.

II. THE FCC'S JURISDICTION OVER ELECTRIC UTILITIES IS EXTREMELY LIMITED

Congress only granted the FCC limited jurisdiction to ensure that the rates, terms and conditions of pole attachments are just and reasonable; it did not authorize the FCC to regulate electric utilities. Thus, the FCC adopted general rules and guidelines rather than detailed requirements in order to implement the Pole Attachment Act and its 1996 amendments. As described below in greater detail, many of the FCC's proposals in the *FNPRM* go well beyond the FCC's statutory authority to regulate the rates, terms and conditions of access.

Section 224 makes clear that the FCC's authority to regulate the rates, terms, and conditions of access is invoked at such time as an attaching entity files a complaint with the FCC alleging a denial of access or an allegedly unreasonable rate, term or condition. The Senate Report accompanying the 1978 Pole Attachments Act stated that the "Commission's

adjudicatory authority would not come into play until a complaining party has brought a matter to the Commission's attention."[2] The Senate Report also stated that "FCC regulation will only occur when a utility or CATV system invokes the powers conferred by S. 1547, as reported, to hear and resolve complaints relating to the rates, terms and conditions of pole attachments."[3] The enforcement process in Section 224(b) of the Communications Act is based solely on hearing and resolving complaints. The FCC's authority to regulate rates, terms, and conditions is directed towards resolution of complaints where the parties are unable to reach agreement. This is further evidenced by the fact that the FCC's rules implementing Section 224 are not binding, per se, because the parties are free to negotiate alternative rates, terms, and conditions for pole attachments.

The FCC has stated that it continues to endorse negotiated agreements.[4] Thus, parties have an obligation to engage in negotiations regarding the rates, terms, and conditions of attachments before filing a complaint case. Where the parties fail to agree upon the terms or conditions of access after engaging in negotiations, the attaching entity can file a complaint with the FCC. Once an attaching entity files a complaint, the FCC then has jurisdiction to hear and resolve the dispute or controversy over a denial of access or an allegedly unreasonable rate, term, or condition of access. The FCC does not have statutory jurisdiction over electric utilities except in the very limited context of these pole attachment disputes.

However, the FCC is now proposing to expand its regulation to reach utilities even earlier in the process before anyone has even requested access to a pole. For example, the FCC intends

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[2]/ S. Rep. No. 95-580, at 22 (1977).

[3]/ *Id.* at 23.

[4]/ *Pole Attachment FNPRM* at ¶ 23.

to mandate that each utility comply with specific timelines for completion of make-ready work, regardless of whether a complaint has ever been filed against the utility. The FCC proposes to require an electric utility to establish and implement a database of all of its assets that could *potentially* be subject to an access request even before it receives a request. The FCC also suggests that it can regulate the practices of utilities outside the scope of the complaint process, including the use of outside contractors, common schedules for make-ready charges, unified management of poles that are owned by more than one utility, and other aspects of joint ownership and joint use agreements. However, all of these proposed requirements would apply to conduct that is either prior to or otherwise outside the scope of a complaint case.[5]

In contrast to the National Broadband Plan, in the context of a statutory rulemaking proceeding, the FCC must be mindful that its proposed regulations interpreting Section 224 will be judged using the two-step process first articulated in *Chevron v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Under the first step in the *Chevron* analysis, courts will examine whether Congress has spoken unambiguously "to the precise question at issue."[6] If the language of the statute is unambiguous, the courts and the FCC must give effect to clear Congressional intent. If Congressional intent is ambiguous, the second step in the *Chevron* analysis involves an analysis of whether the FCC's interpretation of Congressional intent is reasonable.[7] Applying the *Chevron I* test to the FCC's proposals, Congress has spoken precisely to the questions at issue and made clear that the FCC does not have authority to impose requirements on electric

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[5]/ *See American Library Ass'n v. FCC*, 406 F.3d 689 (D.C. Cir. 2005) (holding that the FCC may not seek to regulate outside the bounds of its statutory authority over communication by wire or radio, and may not rely on Title I authority to expand its authority over facilities when they are not engaged in communication activities subject to the FCC's jurisdiction).

[6]/ *Chevron v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

[7]/ *Id.* at 844.

utilities that would apply to conduct that is either prior to or otherwise outside the scope of a specific complaint case.

Therefore, the proposed requirements do not fall within the FCC's jurisdiction and must be rejected. They are not rates, terms, or conditions of access, nor do they facilitate resolution of disputes over such rates, terms, or conditions.

III. THE FCC MUST ENSURE THAT ITS POLE ATTACHMENT POLICIES DO NOT CONFLICT WITH NATIONAL PRIORITIES ON SMART GRIDS, CYBER SECURITY, AND PROTECTION OF CRITICAL INFRASTRUCTURE

The FCC seeks comment on several proposals to revise the current pole attachment regulatory regime in order to promote broadband deployment and competition. The FCC asserts that the primary objectives of the proposed changes are to reduce network providers' costs and speed access to utility poles, resulting in benefits to consumers in the form of increased competition and broadband availability. As the basis for revising the pole attachment rules to promote broadband deployment and competition, the FCC relies heavily on the recommendations set forth in the National Broadband Plan.[8] However, the FCC must conduct its own independent analysis and cannot simply accept the findings of the National Broadband Plan.[9]

A. The FCC's Pole Attachment Policies Must Recognize the Critical Role That Electric Utilities Serve in Managing Critical Infrastructure

EEI and UTC urge the FCC to take a measured and balanced approach to promoting broadband and protecting the safety and reliability of critical utility infrastructure. Because the

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[8]/ *Pole Attachment FNPRM* at ¶ 19, n. 64, citing Omnibus Broadband Initiative, Federal Communications Commission, Connecting America: The National Broadband Plan at 129 (2010), available at http://download.broadband.gov/plan/national-broadband-plan.pdf (National Broadband Plan or NBP) (last visited August 16, 2010).

[9]/ 5 U.S.C. § 553.

agency does not have any concrete evidence that its proposals will actually achieve the goal of promoting broadband deployment, the FCC should not adopt heavy-handed regulations that would impose significant costs on utility ratepayers. The FCC must balance the need for government regulations and oversight against the serious and well-substantiated concerns raised by electric utilities that own and manage this critical infrastructure.

Electric utilities are under specific mandates from federal, state, and local governments with respect to the duties and obligations of providing safe and reliable electric service to the public at reasonable rates. Accordingly, utilities are very different from companies in other industries that are not heavily regulated. As EEI, UTC and many other electric utilities described to the FCC staff in the National Broadband Plan proceeding, utilities and critical infrastructure industry ("CII") entities are charged with the safe, reliable, and efficient provision of energy and other essential services to the public.[10] EEI and UTC and other commenters representing the electric utility industry urged the FCC to develop a National Broadband Plan that supports critical infrastructure because all parties have a vested interest in protecting the safety of the electric infrastructure.

EEI and UTC explained that the Administration has made smart grid technology a centerpiece of the nation's energy policy. In particular, EEI and UTC noted that Congress authorized funding for smart grid demonstration grants and smart grid investment matching grant

[10]/ Comments of Utilities Telecom Council ("UTC") and EEI at 18, GN Docket No. 09-51 (filed June 8, 2009); Reply Comments of UTC and EEI at 2 (filed July 21, 2009); Comments of Southern Company Services, Inc. at 18 (filed June 8, 2009); Reply Comments of Wisconsin Public Service Corporation at 2-3 (filed July 21, 2009).

programs as part of the Energy Independence and Security Act of 2007 and the energy provisions of the American Recovery and Reinvestment Act of 2009.[11]

Thus, in developing and implementing the National Broadband Plan, utilities urged the FCC to be mindful of these national priorities of promoting energy independence and greater energy efficiency.[12] Utilities recommended that the FCC ensure that any policies adopted in the National Broadband Plan affecting pole attachments take into account the critical role that electric utilities serve in managing the underlying infrastructure and providing the electric power that is an essential prerequisite for not only broadband but virtually every other aspect of the economy. Utilities explained that many of the proposals under consideration in the National Broadband Plan would, if implemented, undermine the electric utilities' core mission of providing safe, reliable electric service to the public at reasonable prices. In addition, EEI and UTC argued that the National Broadband Plan should address the significant problem of unauthorized attachments that threaten the safety and reliability of the electric grid.

Now that the FCC is at the stage of proposing specific regulations and policies based on the recommendations of the National Broadband Plan, the FCC must also take a balanced approach to promoting broadband and protecting the safety and reliability of critical infrastructure. The National Broadband Plan failed to discuss how unauthorized attachments severely compromise the safety and integrity of the nation's critical infrastructure,[13] nor did it

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[11]/ Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492 (2007); American Recovery and Reinvestment Act of 2009, Pub. L. No. 115, 123 Stat. 115 (2009) ("Recovery Act").

[12]/ Reply Comments of Wisconsin Public Service Corporation at 2-3; Reply Comments of Southern Company Services, Inc. at 1-3.

[13]/ See EEI and UTC Comments at 31-38 (discussing how unauthorized attachments pose significant safety and reliability hazards).

address the fact that forcing utilities to meet arbitrary deadlines will invariably ignore the complexities involved in make-ready work and lead to even more disputes or jeopardize the underlying infrastructure. Thus, the FCC must address the impact of pole attachment rule changes on these vital national priorities related to energy independence and energy efficiency. The FCC must ensure that its pole attachment rules and policies adopted in the name of broadband are consistent with the national priorities of energy independence, smart grids, and cyber security, and that the FCC does not adopt regulations that undercut these important policy goals. Moreover, the FCC must consider the crucial role that electric utilities serve in managing the underlying infrastructure and providing the electric power that is an essential prerequisite for broadband as well as virtually all other segments of the economy.

B. The FCC's Approach Toward Encouraging Broadband Deployment is Inefficient, Distortionary, and Would Result in Utility Customers Subsidizing Broadband Networks in Violation of Section 224

In introducing Senate Bill 1547, Senator Hollings stated: "Of ultimate concern, however, will be the effect any legislation in this area has on the interests of the consumer, and by 'consumer' I mean not only the cable television subscriber, but the consumer of electric power, telephone and other public services."[14] Section 224(c)(2)(B) of the Communications Act also requires a state that exercises its right of reverse preemption to certify that it considers "the interests of the consumers of the utility services."[15] Congress explicitly intended that pole attachment rules and policies promulgated by a state pursuant to Section 224 should not cause an undue burden on consumers who need electric service at reasonable rates.

[14]/ 123 Cong. Rec. 14974 (May 17, 1977).

[15]/ 47 U.S.C. § 224(c)(2)(B).

Congress's mandate to consider the interests of utility customers applies equally to the FCC's jurisdiction. It would not make sense for Congress to have intended that consumers of electric utility services in some states would be protected, while the FCC would be free to disregard the interest of utility consumers in states that have not exercised reverse preemption.[16] Thus, the FCC must ensure that in regulating the rates, terms and conditions of pole attachment, it also considers the interests of the consumers of utility services.

Yet, in contravention of this Congressional mandate, the FCC seeks to adopt regulations that will impose significant costs on a majority of electric utility ratepayers, while providing minimal benefits to an extremely small number of subscribers of broadband services. The FCC's proposed approach would result in utility customers subsidizing broadband providers that are taking advantage of costly infrastructure installed by utilities to provide electric service. The fact that a broadband provider decides not to offer service in an area that is costly to serve is not evidence of a market failure, but rather evidence that the provider has made an economically rational decision. A recent economic study by the Pew Research Center found that 53 percent of Americans do not believe that expanding high-speed access to everyone in the country should be a major priority of the federal government.[17] The Pew Research Center study also found that non-Internet users are less likely than current users to say that the government should place a high priority on the spread of high-speed connections. The Pew Research Center study would suggest that many people who do not have broadband do not want to have broadband or at least do not feel that broadband should be a government priority. This would indicate that the FCC's

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[16]/ Indeed, the FCC cannot interpret Section 224 in such a way that would cause a violation of the Equal Protection Clause as read into the Fifth Amendment.

[17]/ Pew Research Center: Home Broadband 2010 (August 11, 2010) (available at http://www.pewinternet.org/Reports/2010/Home-Broadband-2010.aspx)

policies – to shift the cost of broadband deployment to the general public through higher electric costs will absolutely increase the cost to everyone without any evidence that it will really increase the use of broadband anywhere.

Thus, there is strong evidence that it is economically inefficient for government regulation to promote broadband deployment at the expense of consumers of electric service. While broadband service to rural areas may be costly because it requires a significant amount of infrastructure, it is not appropriate to impose the costs associated with broadband deployment solely on the consumers of electric service while providing a free ride to broadband providers.

The FCC's rules must not favor one particular technology or type of provider over another. However, the FCC's pole attachment proposals are not technologically neutral because they will discourage the development of alternative technologies by making services that utilize pole attachments artificially less expensive relative to other services such as wireless and satellite. Therefore, the FCC's proposed pole attachments rules are in direct contravention of the Communications Act and the FCC's policy of technological neutrality.

C. Investor-Owned Utilities Do Not Own Pole Plant in Unserved Areas

The National Broadband Plan laid out several aspirations and goals of where the U.S. should be in terms of broadband deployment. As Chairman Julius Genachowski stated, the National Broadband Plan is "idealistic" and represents a "living, breathing strategic blueprint that will be reviewed and revised in light of experience and growing knowledge."[18] Hence, the FCC must be mindful that the National Broadband Plan was, essentially, an academic exercise

[18]/ Prepared Remarks of Chairman Julius Genachowski, Federal Communications Commission, March 2010 Open Agenda Meeting, "A National Broadband Plan for Our Future," Washington, D.C. (March 16, 2010).

that was conducted outside the context of an agency rulemaking. Indeed, Commissioner Robert McDowell also correctly noted that the National Broadband Plan "does not carry with it the force and effect of law."[19] Thus, while the FCC's goal of promoting broadband is laudable, rules promulgated under a legislative enactment must reasonably advance the purposes of the enactment.[20] An agency may have broad rulemaking powers under legislative enactments, but a substantive relationship must be demonstrated between the purpose and means.

While the FCC's mission may be to promote broadband deployment and competition, the rules proposed in the *FNPRM* will not achieve the stated goal. Given the FCC's limited jurisdiction, no matter what regulations are adopted in this proceeding, they will have no impact on broadband availability in large areas of the country where consumers are unserved by broadband. As acknowledged in the National Broadband Plan, the FCC lacks jurisdiction to regulate the rates, terms and conditions for pole attachments in states that adopt their own system of pole attachment regulation or for attachments to poles owned by cooperatives, municipalities and non-utilities.[21] The National Broadband Plan estimated that reforms to the FCC's pole attachment regulations would apply to less than 37 percent of the poles owned by utilities in the U.S.[22] The FCC's most recent Section 706 Report identified counties in the U.S. that are unserved by broadband.[23] According to the FCC's Sixth Section 706 Report, customers in many

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[19]/ Statement of Commissioner Robert M. McDowell (March 16, 2010).

[20]/ *National Tire Dealers & Retreaders Ass'n v. Brinegar*, 491 F.2d 31 (D.C. Cir. 1974).

[21]/ *National Broadband Plan* at 112. (The National Broadband Plan stated that 19 states and the District of Columbia (representing approximately 45 percent of the U.S. population) have exercised reverse preemption. However, since the release of the National Broadband Plan, the number of states has grown to 20 after Arkansas was added to the list on May 19, 2010).

[22]/ *National Broadband Plan* at 112.

[23]/ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such*

counties served by EEI members already have access to broadband services, and the counties in which they serve the largest number of customers are not on the Report's list of unserved counties. Most of the counties unserved by broadband have poles that are owned by municipally- or cooperatively-owned utilities, and therefore not subject to the FCC's pole attachment rules.

The investor-owned utilities typically serve the larger and more populated communities, most of which currently have facilities of existing cable television system or telecommunications carriers attached to their poles. Therefore, the greatest impact of the FCC's proposed pole attachment rules will be in areas that already have broadband service. Simply lowering the pole attachment rental rates, as the FCC proposes to do, will result in taking money from utility customers and transferring it to broadband customers without leading to new broadband deployment. Because a large portion of the unserved population live in areas that would not be affected by the proposed rules, the relationship between the proposed pole attachment regulations and the goal of promoting broadband deployment is remote.

Moreover, the FCC's proposal to lower the telecom rate may actually harm broadband deployment because it would undoubtedly lead to unintended consequences such as discouraging the installation of taller poles with room for attachments because of the reduction in expected compensation. By artificially lowering the price of an attachment, the FCC would reduce the incentive for utilities to install taller poles. Thus, a broadband provider would have to pay for

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Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act; GN Docket No. 09-137, GN Docket No. 09051, Sixth Broadband Deployment Report, FCC 10-129 (rel. July 20, 2010).

the cost of removing the existing pole and installing a taller pole. This would make broadband deployment more expensive and may discourage new entrants.

IV. THE FCC'S PROPOSED TIMELINES FOR MAKE-READY WORK ARE UNREASONABLE

The FCC seeks comment on its proposal to establish a five-stage timeline to govern the pole attachment process for wired attachments.[24] Under the timeline proposed by the FCC, a utility would have 45 days to respond to a request for attachment. The utility would have 14 days after completing the initial survey and engineering assessment to provide an estimate of charges to perform make-ready work. If the requesting entity accepts the tendered estimate within 14 days of receipt, then payment by the applicant would trigger a 45-day period for completion of make-ready work. If existing attachers fail to move their facilities as directed by the utility, the FCC proposes to allow utilities an additional 30 days to complete the project.

A. There is No Basis For Mandatory Make-Ready Deadlines

The FCC lacks statutory authority to impose specific make-ready deadlines on all electric utilities. As discussed above in Section II, the FCC's jurisdiction pursuant to Section 224 is extremely limited and extends only so far as necessary to resolve a dispute or controversy over rates, terms, and conditions of access. However, the FCC's proposal would require a utility to comply with mandatory deadlines even where no cable television system or telecommunications carrier has complained to the FCC about the utility's practices. Therefore, the FCC lacks statutory authority to impose such a requirement on electric utilities.

The FCC's proposal to mandate a 45-day deadline for completing make-ready work is also objectionable because it would inappropriately give a priority to communications

[24]/ *Pole Attachment FNPRM* at ¶ 31.

attachments over critical utility operations, and would therefore compromise critical infrastructure. The FCC itself has previously recognized that guidelines and general rules are preferable to detailed requirements such as mandatory deadlines.[25] In the *FNPRM*, the FCC reaffirms that "no single set of rules can take into account all of the issues that can arise in the context of a single installation or attachment."[26] The FCC also states that it does not endorse national engineering standards and that state and local requirements affecting pole attachments remain entitled to deference.[27] The FCC confirms that "[i]ndividual utilities will continue to make pole-by-pole determinations regarding capacity, safety, reliability and generally applicable engineering purposes."[28]

In view of the aforementioned statements, the FCC must also recognized that the decision by certain states to impose deadlines is influenced by local and regional considerations, such as terrain, weather, and state and local requirements, that do not apply nationwide. Mandatory federal deadlines would ignore these conditions and interfere with the ability of an electric utility to control its infrastructure. The FCC has previously determined that the make-ready process is subject to "numerous factors that may vary from region to region, necessitating different operating procedures particularly with respect to attachments."[29] The FCC has also acknowledged that "[e]xtreme temperatures, ice and snow accumulation, wind, and other

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[25]/ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Report and Order, 11 FCC Rcd 15499, 16068 at ¶ 1143 (1996) ("*Local Competition Order*") (stating that "[u]niversally accepted codes such as the NESC do not attempt to prescribe specific requirements to each attachment request and neither shall we").

[26]/ *Pole Attachment FNPRM* at ¶ 24 (citing *Local Competition Order* 11 FCC Rcd at 16068, ¶ 1145).

[27]/ *Pole Attachment FNPRM* at ¶ 24.

[28]/ *Id.*

[29]/ *Local Competition Order*, 11 FCC Rcd at 16070, ¶ 1149.

weather conditions all affect a utility's safety and engineering practices."[30] Thus, the FCC found that the "number of variables makes it impossible to identify and account for them all for purposes of prescribing uniform standards and requirements."[31] The sudden departure from these prior findings must be reasonably explained, which the FCC has not done.[32]

As the FCC has recognized, only a very small minority of states that regulate pole attachments have imposed deadlines for make-ready.[33] The handful of states that have adopted such deadlines represent the exception compared to other states that have declined to impose make-ready timelines. The fact that few states have adopted make-ready deadlines demonstrates that make-ready is not a significant problem for the communications industry and is not undermining the deployment of broadband services. Even among those states that have adopted timeframes, the requirements vary from state to state and do not reflect a unified consensus on the appropriate timeframe. The experiences of those states, which were informed by numerous meetings of stakeholders to address specific technical details, cannot be translated into a one-size-fits all nationwide approach.[34] The differences among these state requirements reflect regional differences that must be accounted for in the pole attachment process to ensure safety and reliability. Regional differences combined with specific variations of each pole attachment

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[30]/ *Id.*

[31]/ *Id.* at 16071, ¶ 1149.

[32]/ *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009).

[33]/ *Pole Attachment FNPRM* at ¶ 28 (citing five out of 20 states as imposing or in the process of imposing mandatory timeframes).

[34]/ Letter from Brett Kilbourne, Utilities Telecom Council, to Marlene Dortch, Secretary, FCC, WC Docket No. 07-245 at 7-9 (filed Sept. 5, 2008) ("*UTC and EEI September 5, 2008 Ex Parte Letter*").

application, as recognized by the FCC's *FNPRM*, make it inappropriate to apply these state specific rules on a generic basis.

B. In the Event the FCC Adopts Specific Make-Ready Timelines, the Timelines Should be Used As Rebuttable Presumptions and Should be Revised to Accurately Reflect Utilities' Obligations to Ensure Safety and Reliability

Despite the FCC's stated commitment to defer to state and local requirements and decisions by individual utilities regarding safety and reliability, the FCC has proposed unrealistic and unreasonable timelines that fail to take into account variables that can affect the time required to conduct a survey and perform make-ready work, such as the size of the build-out or regional differences. Each utility is operated differently and staffs itself accordingly in order to respond appropriately to attachment requests. However, it is impossible to calculate precisely how much additional staff will be needed to respond in extremely short timeframes to a potentially unknown volume of make-ready engineering or construction requests. The amount of time required for make-ready depends upon the specific request, the current workload of the utility, and the utility's need to conduct maintenance and restoration operations. Some of EEI's and UTC's members operate in areas where there is a shortage of qualified electric contractors needed to perform timely surveys and make-ready under the accelerated timeframe proposed by the FCC.

The FCC claims to appreciate the challenges that a timeline can create and the critical role that utility personnel play in maintaining and restoring electric and telecommunications services. Nevertheless, if the FCC is still inclined to proceed in the direction of specific deadlines, EEI and UTC provide suggestions below on how a timeline could potentially be implemented that represents a better balance between the ability of the pole owner to realistically

complete the work and the attaching entity's preference for speed. At a minimum, the FCC should confirm that any deadlines that are adopted in this proceeding are subject to modification by mutual consent of the pole owner and the entity requesting access through individual pole attachment agreements. Regardless of the recommendations provided below, EEI and UTC reiterate that general guidelines and case-by-case review are preferable to a federally-mandated timeline.

1. The Timelines Should Only Be Used As Rebuttable Presumptions and Utilities Must Be Able to Demonstrate That a Longer Timeline is Warranted

The flexible and variable deadlines that apply in Utah and Vermont adjust the duration of the survey and performance deadlines for both the size of the job and size of the utility. In Utah, requests for access up to 20 poles require that the pole owner respond with an approval or rejection within 45 days and to complete make-ready work within 120 days after receiving an initial deposit payment for the make-ready work. The time for responding to a request increases to 60 days for requests for access to between 21 and 300 poles. For access requests involving 300 to 3,000 poles, the time for responding increases to 90 days and the time for construction increases to 180 days. Request for access to more than 3,000 poles are subject to individual negotiation.

EEI and UTC previously stated that while they did not endorse the approach adopted in Utah for all states, the minimum 120-day period for make-ready work more appropriately balances the needs of the pole owner and the entity seeking attachment.[35] EEI and UTC explained that tying the start of the make-ready clock to a utility's receipt of a deposit on the

[35]/ *UTC and EEI September 5, 2008 Ex Parte Letter* at 8-9.

make-ready work ensures that an attaching entity is serious about making its requested attachment, while protecting the pole owner from liability based on a frivolous complaint.

Other utility commenters expressed their view that the approaches taken by Vermont and Oregon establish a more reasonable deadline than a firm 45-day rule.[36] As those commenters pointed out, Vermont adopted a sliding scale that begins with at least 180 days for completion of the make-ready estimate and performance of make-ready work, unless otherwise agreed by the various parties and except for extraordinary circumstances and reasons beyond the pole-owner's control. In Oregon, parties must negotiate a mutually acceptable timeframe if make-ready work requires more than 45 days to complete or if there are more than 50 poles in an application.

The varying approaches taken by these states demonstrate that different, carefully tailored rules for the make-ready process in each state can be accomplished when the parties take into account regional concerns and state and local requirements. Because no two projects are exactly the same, flexibility to adjust the timelines and meet the needs of each individual project is critical.[37] While the Utah and Vermont approaches are inherently better than a hard and fast, one-size-fits all fixed timeline, the best approach – and the one that allows the most flexibility – would be for the timelines to be determined by the language of the pole attachment agreement between the pole owner and the attacher.

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[36]/ Letter from Thomas Magee, Counsel for the Coalition of Concerned Utilities, to Marlene Dortch, Secretary, FCC, WC Docket No. 07-245 at 8-9 (filed May 1, 2009) ("*Coalition of Concerned Utilities May 1, 2009 Ex Parte Letter*").

[37]/ The FCC itself has noted that it is even difficult for the FCC to complete action on applications it receives within strictly defined parameters because circumstances of individual cases will differ, the order of performing certain tasks may vary, and complex or difficult issues may take more time to resolve. *See*, "Informal Timeline for Consideration of Applications for Transfers or Assignments of Licenses or Authorizations Relating to Complex Mergers," (available at www.fcc.gov/transaction/timeline.html).

In the event that the FCC adopts specific timelines, EEI and UTC recommend that the timelines should only be used as targeted dates for pole owners and attaching entities to complete the make-ready process. The FCC could declare that the timelines are general guidelines and that it expects parties to cooperate in good faith to achieve them, while acknowledging that the timelines may need to be extended depending upon the circumstances. Under this approach, the FCC could establish a rebuttable presumption that any timelines endorsed in this proceeding would be considered just and reasonable in the event of a complaint case. If a utility needs a longer timeline to complete the make-ready work, the FCC should make clear that it expects the requesting entity to cooperate in good faith with the utility to establish an alternative timeline that is more suitable for the project, based on the size of the request, the current workload of the utility, and other circumstances. If the requesting entity refuses to agree upon an alternative timeline, the utility must have an opportunity, in any given case that comes before the FCC, to explain why the presumptive timeline is unreasonable under the circumstances and provide evidence that a longer timeline is warranted. The FCC may conclude, for example, that a delay in the process is outside the control of the utility, either due to the actions or omissions of the applicant or a third party. The FCC may also agree with a utility that the presumptive timeline is unreasonable under the circumstances because the requesting entity seeks access to a large number of poles. In such a case, the FCC could decide that a longer period of time is warranted.

The presumptive timelines should be based on a model similar to the system implemented in Utah by basing the timeline on the number of poles included in an attachment request and the number of requests received by a utility within a given timeframe. Any request that falls outside the scope of the guidelines should be subject to negotiation between a pole owner and an attaching entity. Utilities should be allowed to determine the approach that works

best for them and incorporate a reasonable timeline for large requests into the terms and conditions of individual pole attachment agreements or other operating procedures. EEI and UTC anticipate that individual utilities will provide input through their Comments and Reply Comments on the specific size that should be considered a large request. EEI and UTC urge the FCC to consider their views and adopt a threshold based on their input.

Because attaching entities build out their facilities in stages, the FCC should confirm that it would be reasonable for a utility to require an attaching entity to seek permits from a pole owner in stages. While a utility may be able to respond quickly to routine access requests, it will obviously take longer for the review process and actual construction associated with a request for access to a large number of poles. In most cases, timelines are unnecessary where responsible attaching entities work in cooperation with a pole owner to design the scope and route of their attachment projects to suit their desired target dates. Therefore, the FCC should make clear that it expects attaching entities to cooperate with utilities and work out timetables that reflect the size and nature of the request.

2. The FCC Should Allow Utilities to Decide What Constitutes a Sufficient Request By an Attaching Entity to Trigger the Start of the Make-Ready Clock

The FCC seeks comment on whether it should clarify what constitutes a sufficient request to trigger a timeline or whether it should allow individual parties to decide on the details of the application process.[38] The FCC states that it continues to endorse negotiated agreements.[39] In keeping with the statutory scheme and the FCC's preference for private negotiations, EEI and UTC recommend that the FCC refrain from mandating specific requirements that would interfere

[38]/ *Pole Attachment FNPRM* at ¶ 37.

[39]/ *Id.* at ¶ 23.

with a utility's ability to carefully review an attachment request in accordance with its own internal operating standards. The FCC has recognized that utilities have developed their own internal operating standards because industry-wide standards are too general to take into account regional and local requirements and conditions.[40] The FCC has confirmed that each attachment is unique and it is important to take into account the variables that exist when drafting pole attachment agreements and considering an individual attachment request.[41]

Accordingly, the FCC should continue to allow pole owners to negotiate individual pole attachment agreements that set forth the terms and conditions relating to what specific information a utility needs in order to adequately consider a pole attachment request. Until a utility decides that an attaching entity has submitted an application that is complete and includes all required information, the clock for completing make-ready work should not begin. In some cases, applicants submit applications for access that propose a large number of attachments, differing types of attachments, and requests to attach to poles located in different geographic areas. In those instances, it may be difficult for a utility to be able to quickly determine if an application is complete or what additional information is needed in order for the utility to complete its review. Some applications require more time to consider than others and sufficient time is needed to compile a written record so that utilities can respond within 45 days as required under the FCC's regulations.

Rather than micro-managing every aspect of the negotiation process, the FCC should ensure that pole owners have adequate time to review access requests. Utilities must have sufficient time to decide whether an application is complete and what additional information is

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[40]/ *Local Competition Order*, 11 FCC Rcd at 16070, ¶ 1148.

[41]/ *Id.*

required so that they can make pole-by-pole determinations regarding capacity, safety, reliability, and sound engineering. In any event, EEI and UTC dispute the FCC's contention that a "denial" of access includes a partial or conditional grant of access, and a grant of access that is contingent upon make-ready.[42] Recommending changes or specific make-ready is part of the engineering process and frequently leads to further discussion of potential solutions. The parties should be allowed to continue negotiations to address safety and reliability concerns relating to the location of the attachments. As such, a utility's response that does not unconditionally deny access should merely stop the clock while the parties work through the issues.

3. Significant Errors By An Attaching Entity and Circumstances Beyond a Utility's Control Should Stop the Clock

The FCC correctly recognizes that circumstances beyond a utility's control may require prioritization, or otherwise warrant interrupting the timeline.[43] As discussed below in greater detail, EEI and UTC recommend that certain situations, including but not limited to the following, should stop the make-ready clock: (1) severe weather conditions, outages and other force majeure type events that require utilities to engage in extensive restoration efforts; (2) state and local regulatory proceedings, such as a state public utility commission rulemaking that affect pole attachments; (3) a deficient application that must be returned by the electric utility to the applicant; (4) failure of an attaching entity to respond timely to a utility's request for additional information; (5) failure of an existing attacher to cooperate in moving its facilities to accommodate a new attacher; or (6) the need for a utility to modify a facility to bring it up to code when a new attachment is added to a pole or where a utility may have been unaware of a safety violation until make-ready is performed. In addition to these circumstances, EEI and UTC

[42]/ *Pole Attachment FNPRM* at ¶ 35, n. 120.

[43]/ *Id.* at ¶ 51.

anticipate that individual utilities will address other important factors that warrant stopping the make-ready clock.

Electric utilities often encounter situations beyond their control, such as outages and other force majeure type events that require them to engage in extensive restoration efforts, including mutual assistance to other electric utilities and telecommunications companies, whose networks are felled by disasters. Electric utilities must prioritize the restoration of existing services, both electric and telecommunications, before expending resources to allow for new services. Regulatory proceedings before state public utility commissions can also cause delays to the process.[44]

Delays in the process can also arise from applicants that submit applications for access that are incomplete or contain information later found to be inaccurate. Deficient applications must then be returned by the electric utility to the applicant, which makes it more difficult to complete the necessary studies to determine whether access is feasible. Thus, to the extent that entities requesting access submit applications that are incomplete or contain errors or information that are subsequently found to be incorrect, utilities should be permitted to stop the clock.

Furthermore, no timeline can adequately capture all of the design and field variables that relate to preparing a pole attachment. The FCC's proposal does not provide adequate time for utilities to modify facilities to bring them up to code when a new attachment is added to a pole or where a utility may have been unaware of a safety violation until make-ready is performed.

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[44]/ Letter from EEI and UTC, to Marlene Dortch, Secretary, FCC, WC Docket No. 07-245 at 6 (filed April 16, 2009) ("*UTC and EEI April 16, 2009 Ex Parte Letter*") (describing how proceedings before Florida state regulators to examine the impact of hurricanes on pole attachments necessarily delayed pole access).

Some of EEI's and UTC's members have stated that they will need a minimum of 90 days to complete construction in such situations. In the event that changes are needed to bring a facility up to code because of the new attachment or to correct a previously undiscovered safety violation, utilities must be permitted to stop the make-ready clock.

Regardless of whether the errors reflect a lack of due care by the applicant or miscommunication between the parties regarding what information is required to process an application, the overriding concern for all parties and the FCC must be the safety and reliability of the underlying utility infrastructure. If an attaching entity is allowed to proceed with its attachment simply because an arbitrary deadline is missed and the utility is not provided an opportunity to carefully consider the safety impact of an attachment, there is a strong likelihood that unsafe attachments will be made that could threaten public safety and electric utility reliability. This can later create hazards to pole workers or the public at large, trigger electrical outages, or cause reliability concerns. It is in the best interest of all parties to work together to ensure that unsafe attachments do not create dangerous and harmful conditions for the general public.

An attaching entity's obligation to the make-ready process does not end upon submission of a complete paper application. In order to perform appropriate make-ready, pole owners typically require detailed information regarding the attachment at issue. If an attaching entity fails to respond timely to a utility's request for additional information, regardless of what stage the parties are at in the make-ready process timeline, the clock should also stop.

The bottom line is that there are numerous reasons why delays can occur in the make-ready process that are beyond the control of the utility. It would not be appropriate to hold the

utility liable for the delays caused by attaching entities. Therefore, protocols regarding communication between a pole owner and an attaching entity during the make-ready process, prioritization, and other general operating procedures should be spelled out in individual pole attachment agreements. Each utility should determine its own means of communication and whether any interruptions to the make-ready process should stop the clock.

4. Any Presumptive Timelines That Are Adopted Should Apply Equally to Smaller Requests

The FCC seeks comment on whether it should adopt an accelerated timeline when an attaching entity seeks access to a fewer number of poles below a certain threshold.[45] As discussed above, each attachment request is unique and presents varying safety and engineering challenges. The FCC should not simply assume that because an attaching entity seeks access for a limited number of attachments or to a small percentage of a utility's poles that a utility can automatically process the request and complete make-ready work in proportionately less time. Utilities cannot abandon their obligation to make decisions on a pole-by-pole and attachment-by-attachment basis taking into account capacity, safety, reliability, and generally applicable engineering purposes. Utilities must also consider the request based on the current workload of the utility in light of the utility's primary goal of providing energy to homeowners and businesses, other attachment requests, and the utility's need to conduct maintenance and restoration operations.

Utilities process requests on a first-come-first-serve basis. A system that allows certain entities to seek expedited review and jump to the front of the line would become an administrative nightmare, and could engender claims of discriminatory treatment. It could force

[45]/ *Pole Attachment FNPRM* at ¶ 50.

utilities to stop make-ready work that is already being performed for a larger project. It would also allow attaching entities to game the system by breaking up their projects into smaller requests to get expedited review. Accordingly, if the FCC adopts specific make-ready timelines, utilities should be allowed to rely on those timelines even for small requests.

C. Specific Timelines Would Not be Feasible for Wireless Attachments

EEI and UTC strongly support the FCC's decision to exclude wireless attachments from the proposed make-ready timeline.[46] There are simply too many types of technologies and configurations of wireless equipment attachments. There is a voluminous record developed in this proceeding which makes clear that wireless attachments pose special operational and safety problems, such as the National Electrical Safety Code ("NESC") clearance issues and potential for exposure to radiofrequency ("RF") radiation. Engineering studies demonstrate that electric and communications wires are often close enough to pole-top wireless antennas to pose a safety hazard to utility and communications line workers.

Additionally, there are a wide range of options available to wireless carriers for siting antennas, such as cell towers, monopoles, water towers, and building rooftops. There is a robust marketplace for wireless collocation to these facilities. Thus, wireless carriers seeking access are already able to deploy their systems through marketplace negotiations without government oversight or mandated timelines.

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[46]/ *Pole Attachment FNPRM* at ¶ 32. Even among the minority of states that have adopted specific timelines, the deadlines do not apply to wireless attachments.

V. THE FCC'S PROPOSED DATA COLLECTION AND DISCLOSURE REQUIREMENTS WOULD JEOPARDIZE CRITICAL NATIONAL INFRASTRUCTURE AND IMPOSE UNNECESSARY COSTS

The FCC requests comment on the establishment of an electronic database with information such as the ownership, location and availability of poles, conduit, and rights-of-way.[47] The FCC suggests that such a database might make the overall process of pole attachment access and administration more efficient. However, the more fundamental issue is that the FCC does not have statutory authority to impose a database requirement. EEI and UTC urge the FCC to consider that requiring utilities to publicly disclose critical energy infrastructure information or to turn over such information to a national database maintained by the FCC or an unnamed third-party entity would significantly endanger the safety and operation of energy production and delivery systems across the country. In addition, it would force utilities to devote significant resources and expense without providing any corresponding benefit to the negotiation process or the resolution of pole attachment disputes. Accordingly, EEI and UTC oppose any requirement that utilities be mandated to implement a database.

A. The FCC Lacks Statutory Authority to Require Utilities to Implement Databases

As discussed above in Section II, the FCC's jurisdiction over electric utilities is extremely limited. The FCC's proposal to require utilities to establish, maintain and update an extensive database of their assets goes well beyond the FCC's statutory authority to regulate the rates, terms and conditions of access. Accordingly, under the *Chevron I* analysis, the language of Section 224 is unambiguous and makes clear that the statute does not give the FCC the

47/ *Pole Attachment FNPRM* at ¶ 34.

authority to regulate how a utility manages its assets.[48] However, under the FCC's proposal, an electric utility would be required to establish and implement a database of all of its assets that could *potentially* be subject to an access request even before it receives a request. Such a requirement would not fall within the FCC's jurisdiction because a database is not a rate, term, or condition of access, nor does it facilitate resolution of disputes over such rates, terms, or conditions.

B. Open Access to Utility Records Raises Significant National Security Concerns

EEI and UTC have previously explained to the FCC that making sensitive critical infrastructure information publicly available, such as maps of utility networks, could potentially include protected "Critical Infrastructure Information" under Title II, Subtitle B of the USA Patriot Act.[49] Such information is exempt from Freedom of Information Act ("FOIA") disclosure and should not be included in any database. The FCC should not take action that would preempt, interfere or be inconsistent with efforts by other agencies such as the Federal Energy Regulatory Commission ("FERC") to adopt procedures and standards for protecting critical energy infrastructure information.[50] Hence, the FCC itself should recognize that a requirement for public disclosure of such information has a far greater potential to cause harm to the public interest than to be of any possible benefit to the FCC's stated goal of promoting broadband deployment.

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[48]/ *Chevron*, 467 U.S. at 842.

[49]/ *UTC and EEI April 16, 2009 Ex Parte Letter* at 11.

[50]/ Critical Energy Infrastructure Information, Order No. 662, 111 FERC ¶ 61,447, 70 Fed. Reg. 37,031 (June 28, 2005) (describing efforts by FERC to protect critical energy infrastructure information post-9/11).

EEI and UTC strongly caution the FCC to give serious consideration to the risks and unintended consequences of collecting and providing public access to such critical infrastructure information in a manner that may provide a clear roadmap to those who would seek to harm the interests of the United States. EEI and UTC agree with utilities who have warned the FCC that posting utility records into a national database will expose sensitive information such as specific details of electric distribution systems and electric grids providing service to military bases, airports, law enforcement facilities, financial institutions, hospitals, and federal, state and local government agencies.[51]

Any type of program that involves the external collection, storage, and dissemination of critical infrastructure information would substantially increase the risk that malicious actors obtain and exploit highly sensitive information. A central repository of utility information detailing the location of sensitive infrastructure would likely become the target of those seeking to cause harm and would likely exacerbate the threats against national security. Utilities must keep certain specific details of their system secure and protected against hostile actors who may be looking to identify and exploit vulnerabilities. The type of sensitive information that the FCC suggests should be collected and stored in a national database belongs strictly in the hands of utilities who have experience with ensuring that such information is kept secure. It should not be made publicly available or kept in a database managed by an outside third-party, as proposed by the FCC.

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[51]/ Comments of Alabama Power, Georgia Power, Gulf Power, and Mississippi Power at 36, WC Docket No. 07-245 (filed March 7, 2008); Comments of PacifiCorp, Wisconsin Electric Power Company, and Wisconsin Public Service Corporation at 31, WC Docket No. 07-245 (filed March 7, 2008).

C. Collecting the Data Suggested by the FCC Would Divert Resources Without Providing Any Added Benefits

There is no evidence that gathering and storing all of this information will actually expedite the negotiation of pole attachment agreements and the deployment of facilities. Utilities already provide relevant information upon request to an authorized cable television system or competitive local exchange carrier ("CLEC") requesting access for pole attachments. Even with a database, utilities and prospective attaching entities would still have to undertake a local permitting process to engineer the attachments. Moreover, information in the database would not allow attachers to design their network build out because attachers could not accurately determine loading conditions without actual inspection. It is unlikely that a database would be 100 percent accurate because the number and location of utility poles and the availability of such poles for new attachments could certainly change between the time an applicant submits its access request and when a utility actually begins any make-ready work. An attaching entity would not be able to simply review a database and make decisions regarding the precise scope and route of its attachment project. The parties would still have to conduct field inspections to examine each pole and conduct applicable engineering and loading studies. Therefore, the FCC should not micromanage utility assets as it proposes to do here, especially since there is no evidence that the FCC's proposed database would have any practical benefit for attaching entities or pole owners.

D. Collecting the Data Suggested by the FCC Would Be Extremely Costly

The FCC seeks comment on the number of poles for which data would need to be gathered, how long it would take to inventory them, and the cost of such an inventory.[52] EEI and

[52]/ *Pole Attachment FNPRM* at ¶ 76.

UTC have collected information from its members indicating that it would take several years and cost hundreds of millions of dollars in the aggregate for utilities to gather the additional information. Utilities have also reported that the annual maintenance costs to update and verify information in the database would be extremely costly and time-consuming.

For example, Ameren estimated that it would take approximately 4-5 years to inventory two million poles in Missouri and Illinois at a cost of approximately $42 million. Idaho Power indicated that it would have to field and record data for approximately 550,000 distribution poles, which could take between 6-10 years and cost nearly $20 million. Florida Power and Light reported that it owns approximately 1.2 million poles covering a territory of over 42,000 square miles, of which approximately 70 percent have attachments. The cost to inventory these poles could ultimately range between $30 to $60 million over 5-10 years. Florida Power & Light also expressed concern that it would be extremely difficult to maintain the accuracy of the database, especially when a hurricane causes damage. Other utilities, such as Arizona Public Service Company, estimated that it would take between 3-5 years to gather the information for approximately 665,000 poles at a cost of around $13 million, while Georgia Power Company reported that it would cost up to $83 million to gather detailed information on pole location and communication attachments for over 1.4 million poles.

While the cost estimate and time involved in conducting an inventory of the location and availability of utility poles varies from company to company, it is clear that if the FCC forces utilities to establish and maintain a database, it would impose significant costs on broadband

providers and the consumers who have to pay for it.[53] This would have a chilling effect on broadband deployment and would undermine the FCC's goal of lowering the costs of broadband service to the detriment of broadband consumers.

E. The FCC's Proposals Would Violate the Paperwork Reduction Act Because the FCC Cannot Certify That the Collection of Information is "Necessary for Proper Performance of the Functions of Agency, Including That the Information has Practical Utility"

Congress enacted the Paperwork Reduction Act ("PRA") to ensure the greatest possible public benefit from information collected and disseminated by the Federal Government.[54] The FCC's *FNPRM* seeks comment on possible methods to collect data related to the location and availability of poles, ducts, conduits, and right-of ways and to disseminate that information to the entities who own and use this infrastructure.[55] The reporting requirement presumably would be imposed on all entities owning poles, ducts, conduits and rights-of-way subject to the FCC's jurisdiction under Section 224. Finally, the FCC will either manage the collection and dissemination of this information, or it will mandate the collection of those facts by a third party.[56] Thus, the FCC proposes the collection of information from a substantial majority of an industry, either by itself or by a third party, for the purpose of making that data available to a segment of the public, and the proposed collection is therefore subject to the PRA.

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[53]/ But for the FCC mandating a database, utilities do not have a business reason for collecting the information. Accordingly, the costs would have to be passed immediately and directly to attaching entities and their subscribers.

[54]/ Memorandum for the Heads of Executive Departments and Agencies, and Independent Regulatory Agencies from Cass R. Sunstein, Administrator, Office of Mgmt. and Budget 1 (Apr. 7, 2010). The PRA covers agency mandates to third parties to collect information. *Dole v. United Steelworkers of America*, 494 U.S. 26 (1990)

[55]/ *Pole Attachment FNPRM* at ¶ 75.

[56]/ *Id*. ("Should the Commission collect these data itself, or might industry, including third-party entities, be better suited for the task?")

The PRA requires that each collection of information be necessary for the proper performance of the functions of the agency, including that the information has practical utility.[57] To the extent that the collection of information is unnecessary for any reason, the agency may not engage in the collection of information.[58] The PRA also requires that each collection of information reduce to the extent practicable and appropriate the burden on persons who must provide the information to or for the agency.

The FCC's suggestion that a national database should be created to collect infrastructure information violates the PRA because a national database is unnecessary. The practical utility of a national database will be lower in terms of accuracy, adequacy, reliability, and processing time than individual systems created and managed by individual utilities. The FCC's proposal also violates the PRA because it will impose a significant and costly burden on utilities and ultimately broadband providers and their subscribers who will have to absorb such costs. A national, aggregated database—whether maintained by the FCC or by another entity—requires the solicitation, collection, and update of information from hundreds if not thousands of electric and telephone utilities and the hundreds of entities that attach to the infrastructure owned by the utilities. This approach will not be as accurate or reliable as a system in which the utilities maintain their own databases of information on the entities attached to the infrastructure that they own.

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[57]/ 44 U.S.C. § 3506(c)(3)(A); OFFICE OF MGMT AND BUDGET, CIRCULAR NO. A-130, 6 (Feb. 8, 1996) [hereinafter OMB CIRCULAR].

[58]/ 44 U.S.C. § 3508.

VI. THE FCC SHOULD ENSURE THAT PARTIES HAVE FLEXIBILITY IN POLE ATTACHMENT PERMITTING AND MAKE-READY PROCESS

The FCC seeks comment on several proposals that are designed to improve and expedite the pole attachment permitting process, such as use of outside contractors, designating a "managing utility" for jointly-owned poles, and publishing schedules of common make-ready charges. However, for the reasons discussed above in Section II, these proposals are beyond the FCC's limited statutory authority to regulate the rates, terms, and conditions of pole attachments in the context of a complaint. The FCC lacks authority under Section 224 to adopt regulations that are prescriptive in nature such that they would dictate that a utility take certain actions regardless of whether a complaint has been filed.

In the event the FCC proceeds with its proposed rules, the FCC must remain deferential to state and local pole attachment requirements and decisions by individual utilities regarding safety and reliability. In considering each proposal, EEI and UTC urge the FCC to ensure that pole owners have flexibility to make decisions that take into account variables that can affect the process, such as terrain, weather, state and local requirements, existing contracts, and a utility's internal operating standards.

A. The FCC Should Defer to Other Federal, State, and Utility-Specific Standards for Safety, Reliability, Engineering, and Capacity

Electric utility practices and standards vary significantly from company to company based on differences in geography, climate, state and local regulatory requirements, and operational needs. Section 224(f)(2) of the Communications Act gives the utility the right to deny access on a nondiscriminatory basis for reasons of capacity, safety, and generally applicable engineering purposes. The FCC should acknowledge that its authority to review a

challenged engineering standard or practice as part of the complaint process is limited to determining whether the standard or practice is being applied in a non-discriminatory fashion.

B. The FCC's Proposals To Allow Use of Outside Contractors for Surveys and Communications Make-Ready Work Would Threaten Safety and Reliability of Critical Utility Infrastructure

The FCC proposes that with respect to surveys and communications make-ready work, attachers may use contractors to perform surveys and make-ready work if a utility has failed to perform its obligations within the timelines proposed by the FCC, or as otherwise agreed to by the utility.[59] The FCC also proposes that a utility may deny access by contractors to work among the electric lines, except where the contractor has special communications-equipment related training or skills that the utility cannot duplicate and subject to the utility's discretion.[60] Thus, attachers and their contractors would generally be limited to the communications space and safety space below the electric space on a pole.

Make-ready work is a complicated process that involves survey and engineering review by the utility, approval of the costs by the attacher, and modification of existing attachments among third parties. To the extent that delays occur, they are primarily due to circumstances beyond the utility's control. If attaching entities are allowed to hire their own contractors to perform make-ready if a utility does not meet a mandatory deadline imposed by the FCC, it would undermine utility control of its own infrastructure.

Pole attachment violations can lead to injury or damage and the injured party often seeks to hold the pole owner responsible. Accordingly, pre-approval of contractors alone, without an

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[59]/ *Pole Attachment FNPRM* at ¶ 59, and proposed section 1.1424.

[60]/ *Id.* at ¶ 69.

agreement to give control to utilities, is not sufficient to protect public safety. Even if attaching entities use contractors from a pre-approved list, the contractor would still be working for the attaching entity and would have an inherent conflict of interest in wanting to perform according to the attaching entity's expected timetable and not necessarily in the best interest of the utility, its infrastructure, or the attachments of other parties. Moreover, this requirement would conflict with state jurisdiction over the reliability of electric distribution facilities.

The FCC's proposal to allow attaching entities to use third-party contractors approved or certified by a utility for surveys and make-ready will jeopardize the utility's ability to ensure the safety and reliability of its infrastructure unless the utility has the ability to approve and supervise the contractors' work. For example, the FCC does not address what would be a utility's liability for work performed by an outside contractor under the supervision of an attaching entity but not the utility. In any event, use of outside contractors could lead to disputes concerning what rights utilities have against contractors when there is no direct contact between the utility and the contractor.

The FCC should confirm that it would not be unreasonable for a utility to require the attaching entity to ensure that any such outside contractor must also enter into a separate agreement with the pole owner stating that the contractor agrees to abide by the instructions and standards established by the pole owner for performing make-ready work. The FCC should not allow outside contractors to perform make-ready work on behalf of an attaching entity unless the contractor has agreed to follow the pole owner's design specifications. Attaching entities should not be allowed to rely on outside contractors to do any design work or make decisions regarding the specifications for a particular attachment. Even with utility-approved contractors, utilities would need to appoint design engineers to review calculations and inspectors to oversee any

work. The use of outside contractors must be limited to construction done according to design specifications established and/or approved by the utility, subject to the utility's inspection of the contractor's work at the expense of the attaching entity.

In any event, the Commission should not allow attaching entities to hire third party contractors to work among the electric lines. While the Commission correctly proposes to generally allow utilities to deny access to third party contractors from working among the electric lines, it dangerously provides an exception "where the contractor has special communications-equipment related training or skills that the utility cannot duplicate."[61] As a preliminary matter, the FCC does not have jurisdiction to require electric utilities to allow communications workers or other third-parties in the supply space. Only qualified electric workers are allowed in the electric space, regardless of their skills with communications equipment. To the extent an attaching entity desires space in or near the electric supply space, this would be permitted only with the voluntary agreement of the electric utility. As such, there is no need for the FCC to address, by rule, any conditions under which third-party contractors would be permitted to work in these areas. That is exclusively at the utility's discretion and would be addressed, if allowed, under the parties' pole attachment agreement.

[61]/ *Pole Attachment FNPRM* at ¶ 69.

C. The FCC's Proposals to Expedite Pole Access Would Shift Costs to Utilities, Interfere With Joint Ownership Agreements, and Would Unreasonably "Box In" Utilities to Certain Attachment Techniques.

1. Pole Owners Should be Permitted to Recover Their Make Ready Costs Upfront

The FCC proposes to "align the incentives to perform make ready work on schedule" by allowing attachers to pay for make ready costs in installments.[62] Specifically, the FCC proposes to adopt the Utah rules, which require attachers to pay for half the cost of the project in order to initiate performance, and to pay the next quarter during performance and the remainder at completion of the project. This is contrary to the prevailing practice among utilities, which require upfront payment for make-ready. There are many common sense reasons for requiring upfront payment: 1) utilities should not be required to bear costs that are wholly attributable to attachers; 2) utilities should not be placed at risk of incurring unrecovered costs if the attacher defaults; and 3) upfront payment streamlines the make-ready process, which expedites the deployment of facilities. Moreover, there is no evidence on the record to suggest that make-ready delays have anything to do with requiring upfront payment. Finally, most if not all other states that regulate pole attachments do not require installment payments, and some states actually require utilities to recover their costs upfront. As such, the Commission should continue to allow the parties to negotiate the terms and conditions for the recovery of make-ready costs, and should not require installment payments.

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[62]/ *Id.* at ¶ 70.

2. Requiring Pole Owners to Appoint a "Managing Utility" for Jointly-Owned Poles Would Fundamentally Alter the Relationship and Responsibilities of Joint Owners and Joint Use Agreements

The FCC seeks comment on its proposal to simplify the relationship between prospective attachers and utilities when more than one utility owns the pole by consolidating administrative authority in one "managing utility" for purposes of interaction with the requesting entity and existing attachers during the make-ready process.[63] While some utilities may be willing to consider performing these functions subject to state law and individual contract requirements, the FCC should not mandate that a utility turn over responsibility to the ILEC for making decisions about attachments to jointly-owned poles. Moreover, the type of arrangement proposed by the FCC might not be allowed under certain state laws. The FCC should certainly allow parties to voluntarily enter into such arrangements, but should not require that utilities relinquish their rights. It would be potentially unsafe and fundamentally unfair to rewrite all existing joint ownership agreements to allow one party to unilaterally make decisions for the other party that would impact the joint-owner's use of the facilities. It would be especially unfair if an ILEC were allowed to approve an attachment that encroaches upon the space utilized by the electric utility.

3. Attaching Entities Should be Responsible for Managing Their Own Billings and Collections During the Make-Ready Process Without Imposing This Burden on the Managing Utility

The FCC proposes to require the "managing utility" in a joint-ownership arrangement to take on the role of a "clearinghouse" responsible for managing all billing, collection, and disbursement functions for compensating existing attachers for any rearrangement costs incurred

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[63]/ *Id.* at ¶ 72.

in making room for the new attacher.[64] While a utility may be willing to perform these functions under its existing joint ownership agreements, many utilities have agreements whereby new attachers handle compensation issues directly with the existing attachers. These utilities would be subject to new and greater administrative burdens, responsibilities, and liabilities if the FCC were to compel a change in this relationship. The FCC should be encouraging attaching entities to work together during the make-ready process and to coordinate with each other on billing and collecting the costs of make-ready work. The FCC should not impose additional costs on utilities that do not wish to take on duties unrelated to their core mission of providing electric service to the public at reasonable prices.

4. The FCC's Proposal to Mandate Schedules of Common Make-Ready Charges Lacks Flexibility

EEI and UTC oppose the FCC's proposal to require utilities to make available a schedule of common make-ready charges.[65] As EEI and UTC have discussed throughout these Comments, make-ready work is complicated and varies with each attachment, depending on the type of attachment, the number of existing attachments on a pole, the strength and size of the pole, the geographic location of the pole, and other factors. There are simply too many factors involved that make it difficult to identify make-ready jobs and charges that are most common and could therefore be included in a generalized schedule of charges. The only way for utilities to determine the amount of make-ready work required and the charges associated with that work is to evaluate each request individually.

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[64]/ *Id.* at ¶ 73.

[65]/ *Pole Attachment FNPRM* at ¶ 71.

The FCC essentially seeks to impose a tariff regime on electric utilities similar to the requirement under Section 203 of the Communications Act. However, tariffs are a Title II concept imposed on common carriers. The FCC's authority to impose tariffs does not extend to electric utilities that are not common carriers covered by Title II of the Communications Act. Furthermore, the FCC's proposal to mandate that utilities make available schedules of charges is beyond the FCC's statutory authority. As described above in Section II, the FCC's authority over electric utilities pursuant to Section 224 is limited to resolving disputes. The FCC's regulatory authority under Section 224 is not invoked until such time as an attaching entity files a complaint. Because the FCC's proposal would require a utility to take certain actions even before a complaint has been filed, it is beyond the FCC's authority. Finally, the FCC seeks comment on whether utilities should be limited in revising their make-ready charges on an annual basis.[66] This would unfairly inhibit the ability of utilities to review and adjust their make-ready charges depending up the scope of the specific request, changes to economic conditions, increases in material and labor rates, electric utility contract or master service agreement rate adjustments and other factors.

5. Utilities Should Be Permitted to Change Their Attachment Techniques, and Should Not Be "Boxed In" Going Forward

In response to comments on the record stating that utilities should be able to prohibit boxing and extension arms going forward, even if they had permitted them in the past, the FCC asks "to what extent the nondiscrimination standard in the statute automatically addresses this, or are rules necessary?"[67] EEI and UTC submit that the FCC should permit utilities to change their

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[66]/ *Id.* (citing to New York Public Service Commission's rules which provide that make-ready charges can only be changed annually with notice).

[67]/ *Id.* at ¶ 74.

attachment techniques, such that utilities would not be required to allow attachers to make attachments that utilities themselves no longer permit. Such a rigid interpretation of nondiscrimination would run contrary to utilities' right to deny access for reasons of safety, capacity and generally applicable engineering practices. This would also be bad policy, because "boxing in" utilities in this way could discourage them from ever allowing boxing and extension arms or similar techniques, if the FCC rules required such attachment techniques going forward, *ad infinitum*. Therefore, the FCC should allow a utility to change its pole attachment techniques, and not require a utility to allow attachers to continue to use such techniques after the utility no longer permits them.

VII. THE FCC SHOULD NOT AMEND THE POLE ATTACHMENT RULES TO ALLOW COMPENSATORY DAMAGES IN COMPLAINT CASES

The FCC proposes to amend section 1.1410 to provide for an award of compensatory damages where there is an unlawful denial or delay of access, or where a rate, term, or condition is found to be unjust or unreasonable.[68] For the reasons discussed below, the FCC lacks authority to provide compensatory damages in such complaint cases. Congress did not explicitly or implicitly provide the FCC with such authority. Moreover, the legislative history of Section 224 and judicial precedent demonstrate that Congress did not intend for the FCC to have authority to impose compensatory damages.

A. The FCC Lacks Authority to Impose Compensatory Damages Against Pole Owners

1. FCC Authority Must Flow From Section 224, and It Does Not

Applying the *Chevron I* test to the FCC's proposal to award compensatory damages, the Communications Act, when considered as a whole and based on the legislative history, speaks

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[68]/ *Id.* at ¶¶ 86-7.

precisely to the question at issue and makes clear that the FCC does not have authority to award compensatory damages.

Prior to enactment of Section 224 of the Act, the FCC asserted that it lacked jurisdiction over pole attachments.[69] However, by enacting Section 224 of the Act, Congress directed the FCC to "regulate the rates, terms, and conditions for pole attachments" and to "adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions."[70] In addition, "[f]or purposes of enforcing any determination resulting from complaint procedures established pursuant to this subsection, the Commission shall take such action as it deems appropriate and necessary, including cease and desist orders, as authorized by Section 312(b) of this title."[71] Since the FCC had no jurisdiction over pole attachments prior to enactment of Section 224 of the Act, the authority for the FCC to impose compensatory damages in pole attachment disputes can only be derived, if at all, from Section 224 of the Act. However, the FCC's authority to impose compensatory damages does not derive from Section 224 and, therefore, the FCC does not have jurisdiction to do so.

Pursuant to the above-quoted statutory language, the FCC has been given authority to promulgate rules to carry out Section 224 of the Act. However, nothing in the Section explicitly gives the FCC authority to award compensatory damages in pole attachment disputes. If Congress had wanted to grant this significant authority to the FCC, it would have expressly done so as it has in other areas regulated by the FCC.

69/ *See California Water & Tel. Co, et al.,* 40 R.R.2d 419 (1977).

70/ 47 U.S.C. § 224(b)(1).

71/ *Id.*

For example, when Congress directed the FCC to regulate open video systems ("OVS"), it gave the FCC authority to award damages. Specifically, 47 U.S.C. § 573(a)(2) states:

> DISPUTE RESOLUTION – The Commission shall have the authority to resolve disputes under this section and the regulations prescribed thereunder. Any such dispute shall be resolved within 180 days after notice of such dispute is submitted to the Commission. At that time or subsequently in a separate damages proceeding, the Commission may, in case of any violation of this section, require carriage, *award damages* to any person denied carriage, or any combination of such sanctions. Any aggrieved party may seek any other remedy available under this Chapter.[72] (emphasis added)

Section 224 of the Act does not provide the FCC with similar authority. Because Congress acted intentionally and purposefully to authorize the Commission to award compensatory damages in Section 573, it is presumed that Congress acted intentionally and purposefully in its omission of this authority in Section 224.[73]

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[72]/ It is noteworthy that Congress also directed the FCC to "complete all actions necessary" to prescribe OVS regulations that "… ensure that the rates, terms, and conditions for … carriage are just and reasonable, and are not unjustly or unreasonably discriminatory… ." 47 U.S.C. § 573(b)(1)(A). The words "all actions necessary" imply that broad authority has been vested in the FCC. Even with this broad mandate, Congress still found it necessary to include § 573(a)(2) in the statute, expressly giving the FCC authority to award damages. Such damages would include compensatory damages to remedy a denial of carriage (which is analogous to an attaching entity being denied pole access). In contrast, the language in Section 224 of the Act is more limiting as it directs the FCC to adopt "necessary and appropriate" procedures. The inclusion of the words "necessary and appropriate" limit the scope of the FCC's authority. EEI believes that the FCC's proposal to provide for compensatory damages is neither appropriate nor necessary, and is beyond the statutory scheme as adopted by Congress to resolve disputes.

[73]/ "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1225-26 (11th Cir. 2001) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)); *see also*, *Georgia Power Co. v. Teleport Commc'ns Atlanta, Inc.*, 346 F.3d 1033, 1045 (11th Cir. 2003). Also, "[w]here Congress knows how to say something but chooses not to, its silence is controlling." *CBS*, 245 F.3d at 1225-26 (citation omitted).

2. The Legislative History of Section 224 Demonstrates That Congress Never Intended to Give the FCC Authority to Award Compensatory Damages

The legislative history of Section 224 of the Act (and other federal pole attachment legislation) provides no evidence that Congress ever intended to give the FCC authority to impose compensatory damages on utilities and others. Indeed, to our knowledge, there is no mention in any of the House and Senate Reports of giving the FCC authority to provide compensatory damages. However, there is substantial evidence in the legislative history to show that the FCC's proposal is contrary to Congressional intent in the following ways: (a) Congress did not intend for Section 224 of the Act to trigger the applicability of other FCC requirements on utilities including those set forth in Title II of the Act; (b) Congress envisioned that FCC authority over utilities (which were not previously subject to FCC jurisdiction) would be limited; and (c) Congress desired a simple process to resolve rate and access complaints. Each of the above are discussed more fully below.

(a) Other FCC Requirements Do Not Apply to Pole Owners

Congress never intended for parties subject to Section 224 of the Act to automatically be subject to other FCC requirements including the procedures and enforcement mechanisms set forth in Title II of the Communications Act. For example, the Senate Report accompanying one of the bills that became the Pole Attachments Act of 1978 states:

> Since S. 1547, as reported, does not define the provision of pole attachments as a common carrier service, the full panoply of regulatory procedures and enforcement mechanisms provided in title II of the Communications Act of 1934, as reported, would not automatically extend to utilities subject to FCC pole attachment regulation.[74]

[74]/ S. Rep. No. 95-580, at 21 (1977). In addition, the FCC acknowledged that the regulation of pole attachments is not subject to Title II provisions when it stated: "We wish to emphasize,

Accordingly, Congress did not intend for the requirements of Sections 206 and 207 of the Act (which are under Title II) to apply to utilities and other pole owners.

Section 206, among other things, makes a common carrier liable to an injured person for the full amount of damages sustained in consequence of any violation of the provisions of the Act by the carrier (*i.e.*, compensatory damages).[75] Section 207 gives such an injured party the right to file a complaint for recovery of damages with the FCC or bring a suit in federal district court.[76] By amending its rules and permitting the award of compensatory damages in Section 224 complaint proceedings, the FCC, effectively, would be applying the compensatory damage remedy of Sections 206 and 207 to utilities. This is contrary to Congressional intent. If Congress had intended to give this authority to the FCC, it would have included explicit language in Section 224.

Further evidence that the remedies set forth in Sections 206 and 207 are not intended to apply to parties subject to Section 224 of the Act is found in federal court decisions involving

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however, that the regulation of pole attachments is not regulation of common carriage subject to the provisions for suspension contained in section 204 of the Act." *Notice of Proposed Rulemaking*, Cable Television Pole Attachments, CC Docket No. 78-144; FCC 78-290, Federal Register, Vol. 43, No. 90, May 9, 1978 at Para. 25. *See also Id.* at ¶ 4 ("Tariff filings and other aspects of the full panoply of Title II common carrier regulations need not apply … .").

[75]/ 47 U.S.C. § 206 states: "In case any common carrier shall do, or cause or permit to be done, any act, matter or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

[76]/ 47 U.S.C. § 207 states: "Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies."

private rights of action. For example, in *Virginia Electric & Power Co., v. Comcast of Virginia, Inc, 2010 U.S. Dist. LEXIS 21441; 49 Comm. Reg. (P&F) 947 (E.D.Va., 2010)*, a federal district court found that the plaintiff failed to demonstrate that a private right of action arises under 47 U.S.C. Sections 206 and 207 and 47 C.F.R. § 1.1403 (which requires nondiscriminatory access to poles). The plaintiff argued that defendant's violation of the pole attachment rule gave rise to a private right of action under Sections 206 and 207. However, the court determined that the FCC's implementing pole attachment regulations cannot provide a private right of action that Congress did not expressly or impliedly create through legislative action. The court also noted that there is only one case, *Kansas City Power & Light Co. v. American Fiber Systems, Inc. (No. 03-2330), 2003 U.S. Dist. LEXIS 20983, 2003 WL 22757927 (D.Kan. Nov. 5, 2003)*, where a district court was asked to determine whether Congress intended a private right of action to exist under the Pole Attachment Act. The court in *Kansas City Power* found that the plain language of Section 224 of the Act does not create a private right of action. Thus, at least two federal courts agree that the private right of action set forth in Sections 206 and 207 is not available as a remedial tool for violations of Section 224 of the Act or the pole attachment regulations. This is consistent with EEI's and UTC's view that the FCC has no authority to impose any of the remedies set forth in Sections 206 and 207 (including compensatory damages) to pole attachment disputes.

(b) FCC Jurisdiction Over Utilities is Limited

Congress has made it clear that the FCC's authority over utilities pursuant to Section 224 is limited. Even though Section 224 gave the FCC authority over utilities (and others) whose activities were not otherwise subject to FCC jurisdiction, Congress was not opening the door for expansive FCC powers. According to the Senate Report, "… S. 1547, as reported, does expand

the Commission's authority over entities not otherwise subject to FCC jurisdiction (such as electric power companies) and over practices of communications carriers not otherwise subject to FCC regulation (principally the intrastate practices of interstate or intrastate telephone companies). This expansion of FCC regulatory authority is strictly circumscribed and extends only so far as is necessary to permit the Commission to involve itself in arrangements affecting the provision of utility pole communications space to CATV systems."[77] Given this sentiment, it is difficult to see how Congress would have wanted the FCC to exert greater power over utilities as the FCC proposes to do.

(c) The FCC Complaint Process Must be Simple and Expeditious

Congress gave the FCC certain discretion to select the regulatory tools needed to carry out its new pole attachment responsibilities. However, Congress also wanted the FCC to adopt a simple and expeditious process to evaluate complaints. For example, the Senate Report states: "The committee desires that the Commission institute a simple and expeditious CATV pole attachment program which will necessitate a minimum of staff, paperwork and procedures consistent with fair and efficient regulation. … The bill as reported affords the Commission discretion to select the regulatory tools necessary to carry out its new responsibilities, consistent with the simple complaint procedures specified in the bill, as reported."[78]

If the FCC amends its rules to provide for compensatory damages, the simple proceedings envisioned by Congress will become far more complicated and more time-

[77]/ S. Rep. No. 95-580, at 15. Moreover, according to a House Report accompanying H.R. 7442 (a 1977 pole attachment bill that was not passed by Congress), Congress does "not believe that the FCC should be delegated general jurisdiction over the facilities of electric companies and other noncommunications utilities."

[78]/ S. Rep. No. 95-580, at 21.

consuming. For example, the FCC would be required to engage in an additional level of analysis to assess potential compensatory damages. The FCC may need to review and analyze substantial files, records, and other evidence presented by each party to the dispute to support (or rebut) alleged compensatory damage claims. In addition, as the facts in each situation will likely vary, the FCC will need to go through this cumbersome process in each case.[79] Indeed, challenges to these FCC decisions could result in even more staff hours as the FCC will be forced to defend its damages findings on appeal. This is not what Congress intended.

B. Electric Utilities Are Not Incentivized to Obstruct or Delay Attaching Entities

The FCC proposes to amend its rules and provide for compensatory damages because it believes that "utilities have little incentive to refrain from conduct that obstructs or delays access."[80] However, electric utilities have no competitive reason to obstruct or delay access. The FCC has found that "[i]n the vast majority of cases, electric power companies and other non-incumbent LECs are typically disinterested parties with only the best interest of the infrastructure at heart . . . ."[81]

Moreover, the FCC fails to mention that an attaching entity can promptly file a complaint to address any unlawful denial or delay of access. It is not the utility's fault if an attaching entity does not promptly file a complaint, nor is it the utility's fault if it takes additional time to resolve a complaint. By imposing compensatory damages as proposed, the FCC is requiring utilities to

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[79]/ Further demonstrating Congressional desire for a simple complaint process, the Senate Report states: "It is not the intent of S.1547, as reported, to require the Commission to embark upon a large-scale ratemaking proceeding in each case brought before it, or by general order. … Rather, the FCC is to focus more narrowly on the just and reasonable assignment of utility pole costs to the CATV user." S. Rep. No. 95-580, at 22.

[80]/ *Pole Attachment FNPRM* at ¶ 86.

[81]/ *Id.* at ¶ 68.

take financial responsibility for timing delays which are often outside of their control. If parties promptly file their complaints and the FCC promptly acts on those complaints in simple, expeditious proceedings as Congress has mandated, the perceived harms of delay in obtaining access will be minimal.

C. The FCC Should Not Extend the Time Period for Measuring Monetary Damages (Including Compensatory Damages)

The FCC's rules permit a monetary award in the form of a refund or payment measured from the date that the complaint was filed. Citing the concern that attaching entities might not be made whole under the existing rule, the FCC proposes to amend its rules and allow an attaching entity to seek compensations going back as far as the applicable statute of limitations allows.[82] As discussed more fully below, EEI and UTC believe that this rule change: (1) if adopted along with the proposed amendment to permit attaching entities to recover compensatory damages, will create tremendous disincentives for attaching entities to negotiate in good faith with pole owners and will permit unscrupulous attaching entities to engage in abusive behavior, and (2) creates uncertainty as to what is the applicable statute of limitations.

1. The FCC's Proposal to Extend the Time Period for Determining Monetary Damages Would Discourage Good Faith Negotiations and May Permit Attaching Entities to "Game the System"

The FCC adopted its current rule to "avoid abuse and encourage early filing when rates are considered objectionable by the CATV operator."[83] EEI and UTC are concerned that the FCC's proposal to modify this rule together with its efforts to impose compensatory damages on pole owners, will encourage significant abuses by attaching entities and discourage good faith

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[82]/ *Id.* at ¶ 88.

[83]/ *Id.*

negotiations to resolve disputes. Indeed, the FCC's proposal would encourage unscrupulous attaching entities to seek out ways to "game the system" in order to obtain a financial windfall.

To illustrate our concerns, assume the following scenario: A potential attaching entity approaches a pole owner seeking access to its poles. The pole owner presents terms and conditions which the attaching entity believes are unreasonable. The potential attaching entity engages in some superficial "negotiations" with the pole owner, but decides against pursing the arrangement with the pole owner. Instead, the potential attaching entity invests funds in deploying its own system without obtaining access to the poles, knowing that if there are significant cost overruns in its deployment, it has the ability to file a complaint with the FCC years later for compensatory damages. Two years later (assuming that the relevant statute of limitations is greater than two years), the potential attaching entity files a complaint with the FCC claiming that the original terms and conditions quoted by the pole owner two years earlier were unreasonable.

Under the rules proposed by the FCC, the potential attaching entity in this example could seek compensatory damages that cover a significant portion of the cost of the system that it deployed. Indeed, under the rules proposed by the FCC, there is little incentive for the potential attaching entity to try and negotiate reasonable rates with the pole owner if the pole owner initially presents an offer that the potential attaching entity believes is unreasonable. In addition, there is little incentive for the potential attaching entity to bring this type of dispute to the FCC's attention until right before the tolling of the relevant statute of limitations which would allow it to maximize its compensatory damages. This is clearly not what Congress intended when it enacted Section 224 of the Act.

2. Extending the Deadline Based on the "Applicable" Statute of Limitations Creates Uncertainty

The FCC proposes to change the start date of the refund period to be "consistent with the applicable statute of limitations."[84] The FCC also proposes to revise its rules to order an award of compensatory damages "consistent with the applicable statute of limitations."[85] However, the FCC does not specify exactly what statute of limitations it believes may be relevant. Is it a statute of limitations set forth in the Act? Is it a statute of limitations in the state in which the dispute has arisen? The FCC's failure to identify the relevant statute of limitations is further evidence that it does not have statutory authority to award compensatory damages in pole attachment disputes. The fact that the FCC is unable to point to the relevant statute of limitations also demonstrates that the FCC has not engaged in a careful and thoughtful analysis of its proposal. If the FCC does not know which statute of limitations would apply, how can the FCC fully evaluate the potential real-world impact of its proposal on privately-negotiated contracts? A court would likely find that extending the deadline based on the "applicable statute of limitations" is arbitrary and capricious because the definition is overly vague and unsupported by a reasoned decision-making process.

D. Rather than Eliminate the 30-Day Requirement in Rule 1.1404(m), the FCC Should Modify the Current Rule to Allow Attaching Entities Which Are Engaging in Good Faith Negotiations to Extend the Period.

Section 1.1404(m) provides that a potential attaching entity that is denied access to a pole, duct or conduit must file a complaint within 30 days of such denial.[86] However, the FCC proposes to eliminate this requirement because it believes that the rule unnecessarily pushes

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[84]/ *Pole Attachment FNPRM* at ¶ 88.

[85]/ *Id.*

[86]/ 47 C.F.R. § 1.1404(m).

parties into litigation when the issues could still be resolved by the parties through negotiation. EEI and UTC appreciate the FCC's position, but are concerned that the elimination of this requirement (particularly if the FCC provides for compensatory damages) could create a significant disincentive for attaching entities to negotiate in good faith.

For example, if an attaching entity could potentially receive compensatory damages for a denial of access, it may decide that a viable strategy is not to negotiate in good faith (*e.g.*, prolong the negotiations and engage in stalling tactics) while simultaneously exploring alternative approaches to satisfy its service needs. Indeed, if there is no cut-off date for the attaching entity to file a complaint regarding the denial, the attaching entity may view the possibility of compensatory damages as a financial windfall.

EEI and UTC recommend an alternate approach to the FCC's proposal. Specifically, EEI and UTC recommend that the FCC modify Section 1.1404(m), to allow an attaching entity to submit a notice to the FCC during the 30-day period following a denial of access indicating that the attaching entity is, in good faith, trying to resolve the dispute with the pole owner. Upon receipt of such a notice, the FCC could automatically extend this period an additional 30 days (*i.e.,* the attaching entity, essentially, would have 60 days from the date of denial to file a complaint). This approach would give attaching entities, in their sole discretion, the ability to extend the negotiation period without the need to file an access complaint.

VIII. THE FCC SHOULD ALLOW MEANINGFUL LIQUIDATED DAMAGES FOR UNAUTHORIZED AND UNSAFE ATTACHMENTS IN A COMPLAINT CASE TO DETER ABUSIVE PRACTICES

EEI and UTC applaud the FCC for recognizing the dangers of unauthorized attachments and acknowledging that unauthorized attachments can compromise the safety of electric utility

infrastructure.[87] In particular, the FCC makes clear that "unauthorized attachments can compromise safety because they bypass even the most routine safeguards, such as verifying that the new attachment will not interfere with existing facilities, that adequate clearances are maintained, that the pole can safely bear the additional load, and that the attachment meets the appropriate safety requirements of the utility and the NESC."[88] Thus, the FCC affirms that the concerns raised by utilities are valid and that the problem of unauthorized attachments needs to be addressed.

EEI and UTC strongly agree with the FCC that the liquidated damages currently allowed under its precedent in complaint cases for unauthorized attachments amount to little more than back rent and do not discourage attaching entities from engaging in unlawful behavior.[89] EEI and UTC also strongly support the FCC's conclusion that the deterrent effect of the minimal damages currently allowed is outweighed by the competitive pressures to bring services to market.[90] Because of the enormous competitive market pressures on providers to bring their service to market, attaching entities are willing to absorb the current unauthorized attachment fees in order to gain competitive advantage over attachers who choose to comply with applicable safety and notice requirements. Therefore, in the event of a complaint case, the FCC should uphold liquidated damages imposed by utilities to prevent and punish unlawful practices by attachers and to ensure the safety and reliability of critical electric infrastructure.

87/ *Pole Attachment FNPRM* at ¶ 91.

88/ *Id.*

89/ *Id.* at ¶ 94.

90/ *Id.*

A. The Record Before the FCC Conclusively Demonstrates That Unauthorized and Unsafe Attachments Are a Pervasive Problem

At the same time the FCC seeks comment on increased liquidated damages for unauthorized attachments, the FCC also claims that it is unable to gauge with certainty the extent to which unauthorized attachments are a problem. EEI and UTC suggest that the FCC reexamine the record in this proceeding, which is replete with evidence of high rates of unauthorized attachments and safety code violations by attaching entities throughout the country. As EEI, UTC, and a number of other parties demonstrated in their Comments and Reply Comments filed in this proceeding, unauthorized and unsafe attachments are indeed widespread and serious.[91] EEI's and UTC's members continue to find through their inventories that a significant number of attachments are unauthorized. For example, Ameren reports that a recent audit in 2009 found 37 percent of attachments by cable television operators and competitive telecommunications carriers were unauthorized. Central Vermont Public Service conducted a small inventory last year of approximately 16,647 poles and found that 5.6 percent of poles inspected had unauthorized attachments. CenterPoint Energy completed a five-year audit of over one million poles in 2008 which found 32 percent unauthorized attachments. CenterPoint Energy began a re-audit of the same one million poles and, based on over 200,000 poles surveyed to date, found approximately 10 percent new unauthorized attachments. Utilities should not be forced to engage in this dangerous game of "catch me if you can" with attaching entities.

There can be no question that unauthorized attachments represent a serious and significant hazard for electric utilities and public safety. The FCC needs to make sure that attaching entities act responsibly and do their part to ensure the safety of utility infrastructure and

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[91]/ UTC and EEI Comments at 33-34; UTC and EEI Reply Comments at 65; Comments of AEP at 9-18; Comments of Coalition of Concerned Utilities at 74.

the general public. Given that the FCC believes the dangers of unauthorized attachments "transcend the theoretical,"[92] the FCC does not need to find that the number of unauthorized attachments exceeds a certain numerical threshold or percentage of a utility's poles before allowing utilities to take action to correct the problem. The FCC should not condone any behavior by attaching entities that causes dangerous and unsafe conditions on a utility pole, which in turn can cause loss of life, bodily injuries, or disruption of essential public services.

B. The FCC Should Adopt the Oregon Public Utilities Commission's Liquidated Damages Regime as Presumptively Reasonable

The FCC must address abuses by attaching entities that make unlawful and unsafe attachments in violation of applicable safety and reliability requirements. Specifically, the FCC should encourage utilities to impose substantial liquidated damages for violations of these requirements. The FCC seeks comment on the system implemented by the Oregon Public Utilities Commission ("Oregon Commission") as one potential alternative to the FCC's current regime. As discussed below, EEI and UTC believe that liquidated damages similar to those adopted by the Oregon Commission are just and reasonable.

1. The FCC Should Allow Utilities to Impose Liquidated Damages for Unauthorized and Unsafe Attachments in Pole Attachment Agreements and Enforce Standards Similar to Those Utilized in Oregon Through Complaint Cases or State and Local Courts

In Comments and Reply Comments in this proceeding, EEI and UTC recommended that the FCC establish that liquidated damages based on the Oregon Commission are just and

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[92]/ *Pole Attachment FNPRM* at ¶ 91.

reasonable.[93] In particular, EEI and UTC recommended that utilities be allowed to impose the following liquidated damages and policies based on the Oregon Commission's system:

- An unauthorized attachment fee of $500 per pole for licensees without a contract.
- An unauthorized attachment fee of five times the current annual rental fee if the licensee does not have a permit and the violation is self-reported by the attaching entity or found through a joint inspection process, with an additional sanction of $100 per pole if the violation is found by the pole owner.
- A fee of $200 per pole for safety violations, plus the actual costs of correcting all violations for which the attacher is responsible.
- The FCC should also establish a rebuttable presumption that if an unauthorized attachment is in violation of an applicable safety requirement, the attacher caused the safety violation.
- A utility is allowed to impose an enforceable time limit for attaching entities to correct safety violations, with additional fees for failing to correct violations by the deadline.
- In the case of safety violations that create an imminently hazardous condition on the pole, the pole owner may fix the violation and recover the costs incurred if the licensee does not respond promptly.
- All liquidated damages should be adjusted for inflation.

EEI and UTC recommend that the FCC declare that liquidated damages similar to those described above are just and reasonable. The FCC should encourage utilities to impose liquidated damages similar to those adopted by the Oregon Commission through individual pole attachment agreements. In a complaint case, the FCC should uphold standards similar to those described above as presumptively just and reasonable. Utilities should also be allowed to enforce such liquidated damages included in a pole attachment agreement in any state or local court case involving breach of contract, where applicable under state or local law.

[93]/ UTC and EEI Comments at 79-80; UTC and EEI Reply Comments at 71.

2. The FCC Should Not Create Exceptions to the Penalty System

The FCC seeks comment regarding whether to allow exceptions to liquidated damages for unauthorized or unsafe attachments, such as where a utility assumes ownership of a pole formerly owned by another entity, creates a hazard by adding facilities, changes its safety standards, renegotiates an attachment agreement, or otherwise causes a formerly permitted and safe attachment to lose that status.

Because even one unauthorized attachment can create serious safety problems and allow an attaching entity to obtain an unlawful competitive advantage, the FCC should allow utilities to apply the penalties regardless of the number of unauthorized attachments found in any given case. It would not make sense for the FCC to use a threshold number of unauthorized attachments before allowing utilities to impose these penalties. The FCC should also not be misled by false claims of attaching entities that attempt to shift the blame for their unauthorized attachments. Unauthorized attachments, by definition, occur when third parties install facilities without an attachment agreement or permit. The argument that unauthorized attachments are the result of a utility changing its safety standards or renegotiating an attachment agreement is false. It makes no sense to say that electric utilities previously "accepted" unauthorized attachments, because an unauthorized attachment is an attachment made without permission. Moreover, some electric utilities have had very good reason to modify their attachment procedures as a result of increased incidences of unsafe and unauthorized attachments.

The FCC should not allow attaching entities that ignore safety and reliability requirements to evade any penalties for violations of applicable safety codes. The fact that some safety violations may not previously have been detected or penalized does not mean that they were ever accepted or are acceptable. Moreover, utilities may have been justified in modifying

their safety standards as a result of increased incidences of unsafe and unauthorized attachments. The FCC should recognize that heightened scrutiny by state and local regulators in the wake of reliability incidents or natural disasters, such as the 2003 blackout and the Gulf Coast hurricanes, have led to greater attention to reliability and storm hardening of pole infrastructure.

IX. THE FCC'S REVISED "SIGN AND SUE" RULE WILL NOT ADEQUATELY ENCOURAGE GOOD FAITH NEGOTIATIONS

Under the Commission's so-called "sign and sue" rule, an attaching entity may challenge provisions in a fully-executed pole attachment agreement at any time during the term of the agreement. A number of utilities asked the Commission to eliminate, or at least modify, this rule because it generates continuing frustration in negotiating pole attachment agreements and actually serves as a disincentive to a utility trying to reach a creative and mutually-beneficial agreement with an attaching entity. Under the sign-and-sue rule, a utility can never negotiate and enter a pole attachment agreement with confidence that the agreement can be implemented without challenge at some point in the future. This engenders distrust of the attaching entity's motives at every stage of the negotiation process and tends to prolong negotiations because the utility cannot be assured that the bargain it strikes with the attaching entity can ever be enforced without being compelled to first answer to the attaching entity's accusations that the provisions are unjust, unreasonable, or discriminatory.

Attaching entities admitted in earlier phases of this proceeding that they will sometimes sign an agreement knowing that they do not intend to abide by the terms of the agreement just so they can obtain access to utility property as quickly as possible.[94] In other words, the sign-and-sue rule creates a perverse incentive for an attaching entity to lie to the utility simply to induce

[94]/ Comments of Comcast at 42 and 45; Comments of Knology at 11.

the utility to commence work on the attacher's behalf under the mistaken belief that the parties have a binding agreement. But for the FCC's sign-and-sue rule, this kind of behavior would be considered fraud.

While the Commission claims that it encourages negotiated agreements, the sign-and-sue rule eliminates even the suggestion that an attaching entity must or even should negotiate in good faith, and as a result, undercuts any notion of fair dealing and respect that would otherwise accompany a *bona fide* business negotiation. The reality underlying any pole attachment negotiation is that the agreement itself will probably never be enforced in its current form because the attaching entity will first run to the FCC with a complaint that the terms are unjust or unreasonable and seek a contract modification directly from the FCC, or simply use the FCC's complaint process to delay enforcement of the agreement or to reach a negotiated settlement of provisions with which it now does not agree. At present, there is no downside to an attaching entity behaving in exactly this manner. While attaching entities have made much of perceived delays by utilities in entering pole attachment agreements, the Commission's rules do nothing to halt the ability – and regulatory incentive – attaching entities are given under the sign-and-sue rule to forestall enforcement of the provisions of a pole attachment agreement.

In the *FNPRM*, the Commission acknowledged that utilities had raised questions about attachers' incentives to engage in *bona fide*, good faith negotiations.[95] The Commission also indicated that it will not disturb a bargained-for package of provisions where the evidence (*e.g.*, communications between the parties during negotiations) indicates the utility gave up a concession in exchange for the provision the attacher subsequently challenges as unreasonable.[96]

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[95]/ *Pole Attachment FNPRM* at ¶ 107 n. 291.

[96]/ *Id.* at ¶ 107.

The Commission also reiterates its oft-stated goal that utilities and attaching entities negotiate innovative and mutually beneficial solutions.

To encourage attaching entities to negotiate in good faith, the Commission proposes to amend section 1.1404(d) of the rules to add a requirement that an attacher provide a utility with written notice of objections to a provision in a proposed pole attachment agreement, during contract negotiations, as a prerequisite to bringing a complaint challenging that provision. The Commission further proposes an exception to this rule so that an attaching entity could file a sign-and-sue complaint about any provision that may not be unjust and unreasonable on its face, but only becomes so through the utility's later interpretation or application and where the attaching entity could not reasonably have anticipated that the utility would apply the challenged rate, term or condition in such an unjust and unreasonable manner.

While EEI and UTC appreciate the Commission's recognition that the sign-and-sue rule provides no incentive to attaching entities to engage in *bona fide*, good faith negotiations, the rules proposed in the *FNPRM* would represent only a fig-leaf solution. At best, this rule change would simply place a utility on notice that it will probably have to defend a complaint at some point in the future with respect to the provisions that are identified by the other party as "unjust and unreasonable." It will do nothing to assure the utility that the agreement was negotiated in good faith by the attaching entity. At worst, the proposed rule change merely means that attaching entities may continue to negotiate without any semblance of good faith, and with impunity, by simply identifying all of the major provisions of the agreement as "unjust and unreasonable," signing the agreement, and submitting a complaint at some point in the future on these specially-noticed provisions if the utility ever seeks to enforce the agreement. The attaching entity can also rest assured that even under the proposed rule it can file a complaint to

forestall enforcement of any other provision of the agreement by simply asserting that these provisions are unjust and unreasonable "as applied." From the perspective of an attaching entity, the proposed rules do not mandate even the slightest obligation to negotiate in good faith.

EEI and UTC again urge the Commission to eliminate the sign-and-sue rule so that any disputes or controversies regarding the rates, terms and conditions for pole attachments can be addressed promptly and efficiently at the outset. Section 224(b) calls on the FCC to adopt procedures "necessary and appropriate to hear and resolve complaints concerning such rates, terms and conditions." The legislative history to Section 224 further notes that Congress "desires that the Commission institute a simple and expeditious CATV pole attachment program which will necessitate a minimum of staff, paperwork and procedures consistent with fair and efficient regulation."[97] The sign-and-sue rule provides no incentive for the parties to engage in meaningful negotiations over an agreement that both parties intend to honor, leaves the relationship between the parties open-ended and subject to the whim of the attaching entity, and creates the potential for repetitive and time-consuming disputes over the life of a single pole attachment agreement. This is not the kind of "simple and expeditious" program that Congress had in mind when it gave the Commission authority to resolve pole attachment disputes.

After more than 30 years of having provided attaching entities with the one-sided option of filing complaints at any juncture and for any reason, it is time for the Commission to advise attaching entities that they are now required to negotiate in good faith, raise any disputes expeditiously, and honor the terms of any agreements they sign.[98] Only when the parties are held

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[97]/ S.Rep. No. 95-580, at 21.

[98]/ Despite the Commission's acknowledgment that utilities had raised questions about attachers' incentives to engage in *bona fide*, good faith negotiations, the Commission has not proposed even a basic requirement for attaching entities to negotiate in good faith. In other

to the terms of an agreement entered freely will attaching entities take the negotiation process seriously and will the FCC be able to extricate itself from the task of reviewing almost every provision a utility seeks to enforce against an attaching entity.[99]

X. THE FCC'S PROPOSED TELECOM RATE FORMULA WOULD RESULT IN UNFAIR SUBSIDIES TO ATTACHING ENTITIES AND DISTORT COMPETITION

A. The Exclusion of Capital Costs (Rate of Return, Depreciation, and Taxes) is Not Consistent with the Principles of Cost Causation or the Framework of Section 224(e)

The National Broadband Plan recommends that the Commission "establish rental rates for pole attachments that are as low and close to uniform as possible, consistent with [s]ection 224 of the [Act], to promote broadband deployment."[100] While this is a laudable goal, the Commission's Rate Proposal[101] is inconsistent with Section 224 and contrary to Congressional intent. As explained herein, the FCC is proposing to ignore key provisions of Section 224 as well as Congressional intent in adopting the 1996 amendments to Section 224, in an effort to drive rates under Section 224(e) to levels that are at or below the rates calculated under Section

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contexts, the Commission has adopted rules to specifically require good faith negotiations. See, for example, 2 GHz microwave relocations (47 C.F.R. §101.73(b)), 800 MHz band reconfiguration (47 C.F.R. §90.677(c)), cable television and satellite retransmission consent (47 C.F.R. §76.65), and 700 MHz licensing (47 C.F.R. §27.1315). At a minimum, the Commission should codify a requirement for attaching entities to negotiate in good faith, and adopt meaningful penalties for an attaching entity's failure to abide by these requirements.

[99]/ EEI and UTC disagree with the Commission's conclusion that utilities are able to "exert coercive pressure" in pole attachment negotiations such that attaching entities are effectively compelled to sign the agreement put in front of them. *Pole Attachment FNPRM* at ¶ 104. Any such "coercive pressure" felt by an attaching entity is merely a function of its commercial desire to conclude negotiations quickly and to proceed into commercial service as soon as possible. This is no different from any other profit-seeking entity that must negotiate to purchase inputs. To the extent attaching entities feel they have limited options for installation of equipment, they have a valuable right under Section 224 to bring a complaint to the FCC. They do not need the right to sign an agreement with which they disagree and seek to reform that agreement later.

[100]/ *National Broadband Plan* at 110.

[101]/ *Pole Attachment FNPRM* at ¶¶ 128-14.

224(d). To achieve this result, the FCC proposes to impermissibly redefine costs in Section 224(e), interpreting Section 224(e) as providing for multiple rate formulas, and attempting to drive the rate formula in Section 224(e) to produce a rate that is potentially at or even below marginal cost, which would be an unconstitutional taking.

1. "The Cost of Providing Space" is Clearly Defined

The Commission contends that Congress has not defined "the cost of providing space" in Section 224(e) and, therefore, the Commission has discretion to reinterpret the term "cost."[102] However, the Commission reaches this conclusion based on a flawed analysis by reviewing the term "cost" in a vacuum.[103] A review of the plain words of the statute, Section 224 as a whole, and Congressional intent show Congress clearly defined "the cost of providing space."

Section 224(e)(2) provides:

> A utility shall apportion *the cost of providing space* on a pole, duct, conduit, or right-of-way other than the usable space among entities so that such apportionment equals two-thirds of *the costs of providing space* other than the usable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities.[104]

Sections 224(e)(2)-(3) requires apportionment of "the cost of providing space," which clearly suggests something more definite and specific than a range of costs "based on the relative magnitude of costs included" as proposed by the Commission.[105] Section 224(e)(3) provides:

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[102]/ *Id.* at ¶¶ 130-131. Section 224(e) also uses the phrases "the costs of providing space other than the usable space" and "the cost of providing usable space."

[103]/ *Id.* at ¶ 131.

[104]/ 47 U.S.C. § 224(e)(2) (emphasis added).

[105]/ *Pole Attachment FNPRM* at ¶ 131.

> A utility shall apportion *the cost of providing usable space* among all entities according to the percentage of usable space required for each entity.[106]

Congress did not need to specifically identify which costs were to be included in the telecom rate formula because the plain language of the statute calls for "*the* cost of providing space," which was already defined by Congress in Section 224(d) as the fully allocated cost.[107] Therefore, because the language of the statute is unambiguous, the FCC must give effect to clear Congressional intent in accordance with the analysis under *Chevron*.[108] Section 224(d)(1), which was adopted before Section 224(e) and immediately precedes Section 224(e), sets forth Congress's understanding of "the cost of providing space" — "the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way." Indeed, the Commission's current implementation of Section 224(e) utilizes the cost defined in 224(d)(1) as "*the* cost of providing space."[109] The Commission cannot pick and choose which costs to include in *the* costs for purposes of Section 224(e) when Congress has already spoken.

Further, Section 224(e)(1) grants the Commission the authority to prescribe regulations "to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services, when the parties fail to resolve a dispute over such charges." The Commission's proposal to reinterpret "costs" for purposes of Section 224(e) would not aid in

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[106]/ 47 U.S.C. § 224(e)(3) (emphasis added).

[107]/ *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("[S]tatutory language cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme").

[108]/ *Chevron*, 467 U.S. at 842.

[109]/ 47 C.F.R. § 1.1409(e).

resolving disputes, would frustrate the purpose of 224(e), and would not be "simple and expeditious." Indeed, the Commission's current regulations implement Section 224(e) based on "*the* cost of providing space" to determine a single "just and reasonable rate."[110] The Commission's proposal to drive rates under the telecommunications formula of Section 224(e) toward incremental cost, but to allow use of the rate determined under Section 224(d), whichever is higher, would be contrary to Congress's mandate that utilities "*shall* apportion *the* cost of providing space."[111]

The legislative history of 224(e) focuses on Congressional intent to reallocate usable and nonusable space for the purposes of telecom rate calculations. Indeed, EEI and UTC can find no mention in any of the legislative history to the 1996 amendments to Section 224 that would indicate that Congress was dissatisfied with the Commission's implementation of the "costs" components of 224(d); namely, utilizing a fully-distributed cost approach to set a maximum rate.[112] Congress saw no need to change this approach in 224(e) and therefore simply referred to this fully-distributed cost approach as "the cost of providing space."[113] Congress clearly

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[110]/ 47 C.F.R. § 1.1409(e).

[111]/ 47 U.S.C. § 224(e)(2)-(3).

[112]/ *See, e.g., Georgia Power Co. v. Columbus Cablevision, Inc., Twenty CATV, Inc. and Tele-Communications, Inc.*, 55 RR 2d 940 (1984), in which the Commission itself referred to incremental costs as the "additional cost of providing each pole attachment," and to the fully-allocated costs as the "fully distributed cost of providing each attachment" (*emphasis added*). The Commission noted that both Section 224(d) and the FCC's formulas envision that "fully allocated costs of providing cable attachments will be greater than a utility's incremental costs. As a result, the [Common Carrier] Bureau generally sets a maximum rate as determined by the formula and does not calculate a minimum rate."

[113]/ The phrase "the costs of providing space" in Section 224(e) cannot be equated with or analogized to the phrase "the additional costs of providing pole attachments" in Section 224(d) because the phrase in 224(d) refers to incremental costs (*i.e.*, the *additional* costs that would not be incurred by the pole owner but for the third-party attachment). Section 224(e) is not directed to incremental costs because (1) Section 224(e) does not refer to these costs as the "additional costs" or providing space as in Section 224(d), and it makes very little sense to "apportion"

intended a fully-distributed cost approach and has not authorized the Commission to exclude all relevant costs in the determination of rates under Section 224(e).[114] The Commission fails to provide a well-reasoned explanation of its proposal to discount certain costs of providing space rendering its proposal arbitrary and capricious.[115]

2. Section 224(e) Imposes a Single Telecom Rate Formula Based on "the Costs of Providing Space"

The FCC's proposal is based on the notion that multiple rate formulas can be derived and used under Section 224(e). However, Section 224(e) is not susceptible to this interpretation. "[T]he starting point for interpreting a statute is the language of the statute itself."[116] Section 224(e)(2) provides:

> A utility *shall apportion the cost of providing space* on a pole, duct, conduit, or right-of-way other than the usable space among entities so that such apportionment equals two-thirds of the costs of providing space other than the usable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities.[117]

and Section 224(e)(3) provides:

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incremental costs between the amount of space occupied by an attacher or by the number of attachers.

[114]/ *See, e.g.*, *Chevron*, 467 U.S. at 842-43 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress").

[115]/ *Motor Vehicle Manufacturers Assn v. State Farm*, 463 U.S. 29 (1983) ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise").

[116]/ *Southwestern Bell Corp. v. FCC*, 413 F.3d 1515, 1520 (D.C. Cir. 1995) (quoting *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186, 1191 (D.C. Cir. 1985))

[117]/ 47 U.S.C. § 224(e)(2) (emphasis added).

> A utility *shall apportion the cost of providing usable space* among all entities according to the percentage of usable space required for each entity.[118]

By using the word *shall,* Congress mandated that the telecom rate would be calculated by apportioning the cost of usable and unusable space.[119] This mandate leaves no room for multiple formulas, as it had done in Section 224(d). Further, the chosen title for Section 224(e) — "Regulations governing charges; apportionment of costs of providing space" — makes no mention of multiple formulas, and suggests that Congress wanted the costs of providing space for telecommunications attachments to be apportioned among attaching entities under a single formula as specified in that section.[120]

The U.S. Court of Appeals for the D.C. Circuit previously rejected the Commission's attempt to allow for a range of outcomes where the statutory language requires specificity. In 1993, the Commission attempted to read in ranges of rates to Section 203(a) using an overbroad interpretation of the term "schedules."[121] The Court of Appeals struck down the Commission's overbroad interpretation, holding:

> The agency fails to realize that Congress's expressed allowance of a range of charges in section 205(a) shows that had it envisioned the filing of ranges of rates in section 203(a), it would have included such language. Section 203(a) might have stated, for example, "schedules showing all charges or maximum and minimum charges." Instead, Congress required schedules showing all charges in section 203(a). We find that the Commission has again misread the clear congressional mandate in section 203(a).[122]

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[118]/ 47 U.S.C. § 224(e)(3) (emphasis added).

[119]/ "[T]he Supreme Court has found '[s]hall' to be 'the language of command.'" *Southwestern Bell,* 413 F.3d at 1521 (citations omitted).

[120]/ *See Southwestern Bell,* 413 F.3d at 1520-21 (using title of statute in statutory interpretation).

[121] / *Tariff Filing Requirements for Nondominant Common Carriers*, 8 FCC Rcd 6752 (1993).

[122]/ *Southwestern Bell,* 413 F.3d at 1522.

Likewise with Section 224(e), if Congress had intended to give the Commission flexibility to establish rates falling between incremental and fully-allocated costs, it could have easily followed the same language it used in Section 224(d). Indeed, in Section 224(d), Congress clearly allowed for a range of "just and reasonable [cable] rates" by clearly defining the low end of the range — "not less than the additional costs of providing pole attachments" — and the high end of the range —"nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way."[123] Section 224(e) includes no similar language authorizing the FCC to reduce telecommunications attachment rates to as low as incremental costs.[124] The Congressional mandate in Section 224(e) is clear; and the Commission may not seek to contort the language of Section 224(e) in an effort to subvert the clear intent of Congress that there should be a single telecommunications rate formula based on the fully-allocated cost of the pole.

Moreover, by its own analysis, the FCC concedes that the present telecom rate could be considered within the range of reasonable rates.[125] If the current telecom rate is, by the FCC's own admissions, a "reasonable" rate, it is arbitrary and capricious for the FCC to now propose that it would be unreasonable for a utility to charge that otherwise "reasonable" rate simply

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[123]/ 47 U.S.C. § 224(d)(1).

[124]/ "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *CBS*, 245 F.3d at 1225-26 (quoting *Russello*, 464 U.S. at 23); *see also, Georgia Power*, 346 F.3d at 1045. "[W]here Congress knows how to say something but chooses not to, its silence is controlling." *CBS*, 245 F.3d at 1225-26 (citation omitted).

[125]/ *Pole Attachment FNRPM* at ¶ 132.

because the FCC wants attaching entities to pay lower rates. The FCC's proposal is a transparent attempt to compel electric utilities to subsidize communication service by prohibiting them from charging an admittedly reasonable rate. This is an abuse of discretion as well as inconsistent with a goal of the Telecommunications Act of 1996 to eliminate hidden subsidies.

Even if the FCC is correct that a telecom rate that covers the pole owners' incremental costs associated with attachment would provide a reasonable lower limit, there are a number of costs that utilities incur to accommodate third-party attachments that are not accounted for by the FCC. EEI and UTC expect that individual utilities may provide greater details regarding the additional capital costs they incur outside the make-ready process solely to accommodate third party attachers.

3. Sections 224(d)-(e) Define Two Distinct Statutory Rate Formulas

Congress clearly set forth two separate statutory pole attachment rate formulas, one for cable television systems, defined in Section 224(d), and one for telecommunications carriers, defined in Section 224(e). Despite the express creation of two separate formulas, the Commission's Specific Rate Proposal states "utilities would calculate the low-end telecom rate and the rate yielded by the current cable formula, and charge whichever is higher."[126] This proposal is contrary to express Congressional intent and conflates the purpose of Sections 224(d) and 224(e).[127]

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[126]/ *Id.* at ¶ 141. The Commission states, "[s]ignificantly, the cable rate formula has been upheld by the courts as just, reasonable, and fully compensatory." While courts have upheld the cable rate formula as applied to cable carriers, no court has addressed the issue of whether application of the cable rate formula to telecommunications carriers is just, reasonable, and fully compensatory.

[127]/ It is also inconsistent with the Supreme Court's ruling in *Southern Company v. FCC,* 293 F.3d 1338 (11th Cir. 2002) ("*Gulf Power III*") that the agency can rely on its general grant of

The amendments to Section 224 adopted in the Telecommunications Act of 1996 explicitly define separate rates for attachments by cable systems and telecommunications carriers.[128] The Commission now relies on the "purpose" of the Telecommunications Act of 1996 in support of its hyper-creative proposal to apply the cable rate set forth in Section 224(d) to telecommunications attachers.[129] However, this strained reading of Section 224 ignores the intent of Section 224 and the will of Congress in adopting a new and higher rate structure for telecom attachments.

It was clear that Congress expected – and indeed intended – pole owners would receive greater compensation under Section 224(e), evidenced by the provisions of Section 224(e)(4) allowing for a phase-in of the higher rate, and the grandfathering provisions in Section 224(d)(3) that would allow the Section 224(d) rate to be used for any attachment by a cable television system "solely to provide cable service." The FCC cannot substitute its judgment for that of Congress simply because the FCC wishes to lower the telecom rate in order to support a certain policy outcome. The FCC's proposal would thwart the will of Congress by setting the cable rate as the new default rate.

The FCC's proposal to drive the telecom rate down to the level of the cable rate is unsupported by law, directly contrary to the statutory framework established by Congress, and would require the Commission to interpret Section 224(e) in a way that would lead to a

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authority under Section 224(a) to regulate rates for pole attachments only if the attachments are not covered by either of the Act's two specific rate methodologies: Section 224(d) for attachments by cable television systems or by 224(e) for attachments by telecommunications providers.

[128]/ Telecommunications Act of 1996, Public Law No. 104-104 at section 703; *see also* 47 U.S.C. §§224(d)-(e).

[129]/ *Id.*

potentially unconstitutional taking under the Fifth Amendment to the U.S. Constitution. By interpreting "cost of providing space" as representing only the incremental (or additional) costs associated with providing an attachment, the statutory formula in Section 224(e) would make no sense and, in any event, would result in the pole owner necessarily subsidizing each attaching entity by a significant amount. If one were to substitute the term, "incremental cost" for "cost of providing space" in Section 224(e), as initially suggested by one of the parties, the statutory formula would require the utility to absorb one-third of the incremental costs associated with the unusable space on the pole (under Section 224(e)(2)), and it could be required to absorb additional portions of the incremental costs of each attaching entity because Section 224(e)(3) requires the utility to *apportion* the cost according to the space required for each attaching entity. Not only is this interpretation nonsensical from a plain reading of Section 224(e), but it would result in an unconstitutional taking of the utility's property by compelling it to absorb some portion of the incremental costs for each third-party attachment. Congress could not have intended such a result.

The courts have determined that to survive constitutional challenge, pole attachment rates must assure the utility will receive at least the marginal or incremental cost of providing the attachment.[130] Section 224(d) specifically provides, as a statutory minimum, that the utility must be assured it will recover "not less than the additional costs of providing pole attachments;" *i.e.* its marginal or incremental cost. By contrast, and as discussed above, Section 224(e) provides no similar minimum but instead directs that the Commission "shall" apportion costs according to the amount of usable and nonusable space required by or attributed to each attaching entity.

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[130]/ *FCC v. Florida Power Corp.*, 480 U.S. 245, 253 (1987), and *Alabama Power Co. v. FCC*, 311 F.3d 1357, 1370 (11th Cir. 2002)

The Commission recognized the constitutional infirmity in trying to directly interpret "costs" as "incremental costs" for purposes of Section 224(e), when it noted that "the section 224(e) formulas allocate the relevant costs in such a way that simply defining 'cost' as equal to incremental cost would result in pole rental rates below incremental cost."[131] To overcome this interpretation of Section 224(e) that would lead to this unconstitutional result, the Commission is instead proposing to reduce the costs to as close to incremental as it can, while providing a safety valve whereby the utility may elect either the "lower bound" of the telecom rate (*i.e.*, a rate that is or could be lower than the utility's incremental cost of providing space) or a rate determined under the Section 224(d) cable television rate formula. The Commission's proposal offers the pole owner with a Hobson's choice: accept a rate under the Commission's new interpretation of Section 224(e) which will likely result in an unconstitutional taking of utility property, or accept a more "generous" rate determined under Section 224(d) which, by definition does not apply to attachments by telecommunications carriers.

Congress specifically recognized that the telecom rate would be substantially higher than the cable rate and provided for a five-year delayed implementation of the new rate formula, as well as a phase-in of the new telecom rate formula over an additional five year period. Thus, Congress explicitly contemplated under Section 224(e) that attaching entities providing telecommunications services would be charged higher rates for their pole attachments. Congress fully understood the ramifications of Section 224(e) and made the policy judgment that higher rates for telecom attachments were just and reasonable. Indeed, Congress allowed the FCC to use the Section 224(d) rate for telecommunications attachments during the two-year period following enactment of the Telecommunications Act of 1996 until the FCC could adopt

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[131]/ *Pole Attachment FNPRM*, at ¶ 126.

regulations to implement the new and higher rate formula under Section 224(e). If Congress had intended for the telecom rate to be equal to or lower than the cable rate, or to allow the FCC to substitute the cable rate formula for the telecommunications rate formula at any time, it could have easily done so in 1996.[132] There would have been no need for Congress to allow temporary use of the cable formula during the two-year period following enactment of the Act, allow a phase-in for the telecom rate formula, allow "cable-only" cable television systems to remain grandfathered at the cable rate, or delay implementation of the new rate if Congress had intended for the telecom rate to be equal to or lower than the cable rate.

As the Court of Appeals for the District of Columbia held, "Congress enacted the Communications Act and the mandates of the Act are not open to change by the Commission or the courts. If the Commission believes those mandates inadequate to the task of regulating the telecommunications industry in light of changed circumstances, the Commission must take its case to Congress."[133]

B. The FCC Should Revise its Current Telecom Rate Formula to Ensure Full and Fair Cost Allocation Among All Attachers

The FCC's current rental rate formula for attachments by telecommunications carriers unfairly provides a substantial subsidy at the expense of electric consumers because it does not

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[132]/ Moreover, the National Broadband Plan does not allow for a reinterpretation of Congressional intent because the deployment of Advanced Telecommunications Services was one of the explicit policy goals of the Telecommunications Act of 1996. Congress saw no inherent statutory or regulatory problem in authorizing higher pole attachment fees for telecommunications attachments at the same time it was encouraging broadband deployment. It is arbitrary and capricious and an abuse of the Commission's discretion to so drastically reinterpret Congressional intent.

[133]/ *Southwestern Bell Corp. v. FCC*, 413 F.3d 1515, 1519 (D.C. Cir. 1995). "[The Supreme Court's] estimations, and the Commission's estimations, or desirable policy cannot alter the meaning of the Federal Communications Act of 1934." *Id.* (quoting *MCI v. AT&T*, 512 U.S. 218, 234 (1994)).

fully and fairly allocate the costs of the common space. The current telecom formula also contains inaccurate presumptions regarding the number of attaching entities that further distort competition.

1. The FCC Should Allocate the Communications Worker Safety Zone Space to Common Space

As EEI and UTC explained in their Comments and Reply Comments, the FCC should allocate to the attaching entity the costs associated with the communications worker safety zone space on the pole, which space exists to protect workers of the communications attachers.[134] The FCC currently presumes that the 40-inch communication worker safety zone is usable space, used by the utility. Therefore, the electric utility must pay for the entire portion of pole costs attributable to the safety space. The NESC Handbook provides that safety space is required not for the benefit or convenience of the electric utility, but to prevent accidental contact between the electric wires and the communications wires and to provide headroom for the communications workers.[135] The safety zone exists so that communications companies can employ workers who are not certified to work near high voltage electric lines. Electric utility workers are highly trained to work with and around energized wires, and thus would not need a special safety space if there were no communications attachments. Therefore, the FCC should regard the safety space as unusable space that is divided equally among all attachers.[136]

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[134]/ UTC and EEI Comments at 103-04.

[135]/ Allen L. Clapp, NESC Handbook (Sixth Edition), commentary on NESC Rule 235C (Vertical Clearance Between Line Conductors) at p. 416.

[136]/ The FCC's proposal to allow attachers and their contractors to work in the safety space below the electric space on a pole is further evidence that the safety space should be allocated to the attaching entities.

2. The FCC Should Lower the Presumed Number of Attaching Entities

As EEI and UTC previously explained, the FCC's presumptions regarding the number of attachers are unrealistic and result in substantial subsidies at the expense of the electric utility pole owner.[137] The FCC should revise the current presumptions regarding the number of attaching entities in light of market developments since the presumptions were adopted. First, in determining the number of attaching entities on a utility pole, the FCC should count only attachments by cable television operators and CLECs, not attachments made by ILECs, government entities, or by the utility itself. Section 224(e) requires the utility pole owner to apportion the cost of the unusable space "among entities" so that the apportionment equals two-thirds of the cost that would be allocated "under an equal apportionment of such costs among all attaching entities." The term "attaching entities" for purposes of Section 224 is an entity that makes a "pole attachment," which is defined in Section 224 as any attachment by a cable television system or provider of telecommunications services to a pole, duct, conduit, or right-of-way owned or controlled by a utility. Accordingly, EEI and UTC recommend that the FCC strike the definition of "attaching entity" in 1.1402(m) and substitute the following definition: "[t]he term attaching entity means a cable system operator or provider of telecommunications services with a pole attachment as defined in subsection 1.1402(b)."

Even if the FCC includes ILECs in counting the number of attaching entities, the FCC should not charge the pole owner with the cost of other attachments made by governmental entities. State and local governments typically do not pay a fee for their attachments. Use of the pole by a government entity effectively constitutes a tax on the electric utility. Including

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[137]/ UTC and EEI Comments at 105-09.

attachments by government entities also increases the size of the subsidy to other attachers. For example, if there are three attachers, including the utility, each entity may be responsible for one-third of the costs associated with the nonusable space on the pole. If a government entity also attaches to the pole and is counted towards the number of attaching entities for rate purposes, the share of costs attributed to the other two attachers is now reduced. In other words, they are paying less than before, while the utility is now responsible for its own share of the costs plus the share attributable to the government entity. There is no justification for increasing the size of the subsidy to other attachers just because a government entity also chooses to attach to the pole. The most effective way to ensure that each attaching entity bears its fair share of this additional "tax" would be to exclude government entities in determining the number of attachers.

The FCC should eliminate the distinction between rural and urban areas and establish a new presumption that there are three attaching entities per pole for all areas, including the electric utility. If the FCC agrees with EEI and UTC that the pole owner should not be counted as an attaching entity, the presumptive number of attaching entities should be two per pole for all areas. The FCC initially estimated that there would be three attaching entities in rural areas and five attaching entities in urban areas. EEI's and UTC's members have reported that the number of attaching entities does not vary substantially between rural and urban areas. EEI's and UTC's members have also indicated that the number of attaching entities is far fewer than the presumptive average used by the FCC for urban areas. Utilities generally have an average of fewer than three attaching entities per pole on poles with third-party attachments, both in rural and urban areas. These averages are calculated to reflect only poles with third party attachments. If all poles owned by the utility were included, the average numbers would be even lower,

because electric utilities typically have many electric-only poles (*i.e.*, with no third party attachments).

Finally, the FCC's regulations should be revised to clarify that all attachments of any kind by a cable television system operator or CLEC should be taken into account in determining the amount of usable space allocated to the entity. Section 224(a) defines a pole attachment as "any attachment" by a cable television system or provider of telecommunications service. Section 224(e)(3) provides that the cost of providing usable space is apportioned "according to the percentage of usable space required for each entity." In the case of an attachment of an ordinary wire, the space required includes the clearance space between each attachment. However, in the case of an attachment of any additional device or equipment, the FCC should allow a utility to take into account all additional space "required" for such device or equipment in calculating rates. Overlashed attachments impose substantial wind and ice loading burdens on electric utility poles. Accordingly, the FCC should require that each overlashing be counted as an additional attachment for which the attaching entity must pay a separate, additional rate.

XI. ILECS DO NOT HAVE STATUTORY RIGHTS UNDER SECTION 224

Although the FCC does not propose any specific rules regarding pole attachments by incumbent local exchange carriers ("ILECs"), the FCC nevertheless seeks comment on the regulation of rates paid by ILECs. As EEI and UTC have previously explained, the FCC does not have authority to regulate attachments by ILECs because Section 224(a)(5) explicitly excludes ILECs from the definition of "telecommunications carrier" for purposes of pole attachments. Therefore, the FCC should not alter its current approach to the regulation of pole attachments by ILECs.

A. The FCC Correctly Recognizes the Statutory and Policy Complexities to Regulation of ILEC Attachments

In the *FNPRM*, the FCC states that the issues related to ILEC attachment rates "raise complex questions" and seeks to revisit these issues given the "statutory and policy complexities" involved.[138] While EEI and UTC agree that the proposals submitted by certain parties seeking regulated rates for ILECs would require the FCC to engage in a complex and convoluted analysis to justify regulation of ILEC attachment rates, EEI and UTC assert that the issue is actually quite simple.

As EEI and UTC explained, the plain text and structure of Section 224, the plain text and structure of the Communications Act as a whole, and the legislative history of Section 224 demonstrate that the term "provider of telecommunications service" in Section 224(a)(4) has the same meaning as the term "telecommunications carrier" in Section 224(f).[139] The term "telecommunications carrier" is defined in Section 3(44) of the Communications Act as "any provider of telecommunications services," which is the same phrase used in Section 224(a)(4).[140] Therefore, the phrase "provider of telecommunications service" in Section 224(a)(4) has the same meaning as "telecommunications carrier." Section 224(f)(1) provides that an electric utility must provide nondiscriminatory access to telecommunications carriers. If ILECs are "providers of telecommunications service," but ILECs are not "telecommunications carriers," that would lead to the absurd result that ILECs would be entitled to regulated rates but would lack any right of access. Another absurd result would be that utilities would have no right to deny access to ILECs for reasons of safety, reliability, and engineering because Section 224(f)(2)

138/ *Pole Attachment FNPRM* at ¶ 143.

139/ UTC and EEI Comments at 110-126.

140/ 47 U.S.C. § 153(44).

only allows an electric utility to deny access to any "telecommunications carrier," but does not provide a right to deny access to "providers of telecommunications service." Thus, Section 224 read in its entirety demonstrates that the terms "telecommunications carriers" and "providers of telecommunications service" are used interchangeably.

The legislative history of Section 224 demonstrates that ILECs were not intended to benefit from regulated pole attachment rates. The purpose of the 1996 amendments to Communications Act was to encourage facilities-based competition by CLECs by granting them protections previously afforded to cable television operators. Congress stated that the 1996 reforms included "revisions to section 224 of the 1934 Act to allow competitors to the telephone companies to obtain access to poles owned by utilities and telephone companies at rates that give the pole owners a fair return on their investment."[141] Congress expanded the FCC's jurisdiction to remedy the anomaly that enabled cable television systems to obtain regulated rates, while denying CLECs a comparable right to regulated rates. However, Congress explicitly excluded ILEC attachments from the regulated pole attachment rates and access provisions under Section 224.[142]

Furthermore, the FCC itself has consistently and repeatedly interpreted Section 224, as amended by the 1996 Act as excluding ILECs from the entities entitled to the protections of Section 224. In orders and rulemaking proceedings implementing the 1996 Act, the FCC has

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[141]/ Communications Act of 1995, S. Rep. No. 103-367 on S. 1822 (July 24 1995).

[142]/ 47 U.S.C. § 224(a)(5).

confirmed that Section 224 does not extend to attachment rates for ILECs on poles owned by electric utilities or other local exchange carriers.[143]

B. The FCC Should Not Disturb Joint Use Ownership Agreements

The FCC should refrain from adopting any regulations that would disturb the joint use relationships between electric utilities and ILECs that have existed for decades. These types of arrangements are based on mutual benefits and responsibilities negotiated between the parties subject to oversight by state public utility commissions. Both parties are dependent upon each other for access under joint use and joint ownership agreements.

1. ILECs Do Not Need Regulated Rates to Deploy Broadband Services

The FCC does not need to regulate ILEC attachment rates in order to spur broadband deployment. ILECs continue to own a significant number of poles and do not lack access to infrastructure needed to deploy broadband service. Joint use and joint ownership agreements have provided a viable framework for establishing the amount of compensation exchanged between electric utilities and ILECs and related rights and responsibilities. These types of arrangements have been beneficial to both parties and there is no need for the FCC to disturb them. So long as attachments are made in a manner that is consistent with the electric industry's core mission of providing safe and reliable electric service, it is in the interest of the electric industry to accommodate attachments. ILECs have presented no evidence in this proceeding that widespread delays resulting from current joint use and joint ownership agreements have stalled the progress of broadband deployment.

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[143]/ UTC and EEI Comments at 122, n. 135.

2. Joint Use and Joint Ownership Agreements are Designed for Situations Where Both Parties Own Poles

The reciprocal compensation arrangements under joint use and joint ownership agreements cannot be compared to the pole attachment agreements between electric utilities and cable television systems and telecommunications providers. These agreements are regulated under state and local laws and regulations because they involve ownership of public utility assets. It would be extremely difficult for the FCC to regulate attachment rates in the context of such agreements without becoming embroiled in disputes over ownership interests and raising issues of preemption of state laws.

Joint use and joint ownership agreements inherently reflect the fact that each party has an ownership interest in the pole plant. EEI and UTC understand that the amount paid by an ILEC to an electric utility varies widely according to the circumstances involved, including variations in the rights, benefits, and responsibilities allocated to each party, the length of time since the agreement was revised, and varying obligations under state and local laws.

3. It Would be Unfair and Unreasonable to Allow Any Attaching Entity, Including ILECs, to "Opt In" to Existing Pole Agreements, Joint Ownership, or Joint Use Agreements As Recommended by NCTA

The FCC seeks comment on a proposal made by the National Cable and Telecommunications Association ("NCTA") whereby any attaching entity, including ILECs, would be permitted to "opt in" to existing agreements.[144] Under NCTA's proposal, each pole owner would be required to make each pole attachment agreement, joint ownership, or joint use agreement publicly available, and any attaching entity, including ILECs, could opt in to those agreements, accepting all of the terms and conditions of the agreement.

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[144]/ *Pole Attachment FNPRM* at ¶ 147.

Allowing an ILEC to opt in to an existing pole attachment between a cable system or a CLEC and an electric utility would ignore important distinctions between ILECs and CLECs and cable systems. It would also significantly disrupt the long-established contractual positions of electric utilities and ILECs by providing ILECs with a subsidized regulated rate for their attachments while leaving electric utility attachments on ILEC poles governed by previously negotiated rates. Joint use agreements are based on parity between ILECs and utilities, with each company sharing the cost of ownership.

Many of the terms and conditions included in pole attachment agreement with cable systems and CLECs would not translate into an agreement between an electric utility and an ILEC. Joint use agreements may provide for sharing of pole costs based on different allocation of costs than otherwise provided for under the FCC's current rules for attaching entities. Joint ownership agreements also reflect a different level of coordination between two pole owners regarding third-party attachments. Thus, it would be extremely unfair to allow CLECs and cable operators to opt into a joint use or joint ownership agreement or to allow ILECs to opt into a pole attachment agreement to obtain regulated rates. It would also impose significant burdens and responsibilities on the FCC to arbitrate disputes relating to infrastructure ownership issues, complications associated with joint ownership, and become heavily involved in interpreting field inventory contractual issues.

XII. CONCLUSION

WHEREFORE, THE PREMISES CONSIDERED, the Edison Electric Institute and the Utilities Telecom Council respectfully request the Commission to take action in this docket consistent with the views expressed herein.

Respectfully submitted,

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